

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PATRICIA MARRERO : DETERMINATION
 : DTA NO. 828100
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 :
Years 2010 through 2012. :

Petitioner, Patricia Marrero, 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 years 2010 through 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), brought a motion dated March 26, 2018, 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) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., of counsel), was granted an extension of time to file a response and on May 1, 2018, filed a response and a cross-motion for summary determination pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation was granted an extension of time to file a response and filed a response to petitioner's cross-motion on June 7, 2018, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all

pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of deficiency for the years 2010, 2011 and 2012.

FINDINGS OF FACT

1. On February 21, 2017, petitioner, Patricia Marrero, filed a petition with the Division of Tax Appeals challenging a notice of deficiency, assessment number L-045564631, dated October 20, 2016 (notice), issued by the Division of Taxation (Division) for the years 2010, 2011 and 2012.

2. On March 30, 2017, the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner. The parties timely filed responses to the notice of intent to dismiss petition and on October 12, 2017, the Division of Tax Appeals issued an order withdrawing the notice of intent to dismiss petition and ordering the Division to file its answer within 75 days of the date of the order.

3. The Division filed an answer on December 6, 2017.

4. On December 15, 2017, petitioner filed an amended petition.

5. On March 25, 2018, the Division filed an amended answer.

6. In support of its motion and to show proof of proper mailing of the October 20, 2016 notice, the Division provided the following with its motion papers, among other documents, (i) an affidavit of Ellen K. Roach, a senior attorney employed in the Office of Counsel of the Division, dated March 26, 2018; (ii) an affidavit, dated March 9, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis

and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked October 20, 2016; (iv) an affidavit, dated March 12, 2018, of Fred Ramundo, a supervisor in the Division’s mail room; (v) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and mailing cover sheet addressed to petitioner at 321 Moroe Street, Apt 3, Hoboken, New Jersey 07030; (vi) a copy of a notice of deficiency, number L-045564631, dated October 20, 2016, and mailing cover sheet addressed to R Becerra, as petitioner’s then representative, at 302 7th Street, Hoboken, New Jersey 07030; and (vii) a copy of petitioner’s e-filed resident income tax return for the year 2015, dated April 13, 2016 and filed on April 16, 2016. Petitioner’s 2015 return lists the same Hoboken, New Jersey, address for petitioner as that listed on the subject notice. Petitioner’s 2015 return also lists petitioner’s then representative as Ray Becerra at the same address listed on the copy of the subject notice sent to the representative. Ms. Roach avers that petitioner’s 2015 return was the last return filed with the Division by petitioner before said notice was issued and that the address listed thereon was petitioner’s last known address.

7. The affidavit of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and has been Acting Director of MAPS since May 2017, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 “10/20/16.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

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 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.” Additionally, according to the Picard affidavit, the last page of the CMR lists the total number of pieces of mail, as well as the total amount of postage and fees.

9. The CMR in the present matter consists of 22 pages and lists 240 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 22, which contains 9 entries. Ms. Picard notes that the copy 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. A USPS representative affixed a postmark dated October 20, 2016 to each page of the CMR, wrote and circled the number “240” on page 22 next to the heading “Total Pieces

Received at Post Office” and initialed or signed page 22. Ms. Picard adds that the total number of statutory notices mailed pursuant to the CMR was 240.

10. Page 1 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3491 and reference number L-045564631 was mailed to “MARRERO-PATRICIA” at the Hoboken, New Jersey, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and the name “MARRERO-PATRICIA” and address as noted.

11. Additionally, page 1 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3507 and reference number L-045564631 was mailed to “R BECERRA” at 302 7th Street, Hoboken, New Jersey. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and the name “R BECERRA” and address as noted.

12. The affidavit of Fred Ramundo, a supervisor in the mail room since 2013 and currently a Stores and Mail Operations Supervisor, describes the Division’s mail room’s general operations and procedures. Mr. Ramundo attests that he is familiar with the Division’s present and past office procedures as related to statutory notices, and that these procedures have remained essentially unchanged since approximately 1992. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives 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 first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed

on the CMR. The CMR has been stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” 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 initials or signature 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 in exhibit “A” of the Picard affidavit contains a USPS postmark of October 20, 2016. On page 22, corresponding to “Total Pieces and Amounts,” is the preprinted number 240 and next to “Total Pieces Received At Post Office” is the handwritten and circled entry “240.” There is a set of initials or a signature on page 22.

13. Mr. Ramundo further states that based on his review of the Picard affidavit and exhibits attached thereto, and his personal knowledge of the procedures of the mail room, he can attest that on October 20, 2016, an employee of the mail room delivered one piece of certified mail addressed to “MARRERO-PATRICIA, 321 MOROE STREET APT. 3, HOBOKEN, NJ 07030” and one piece of certified mail addressed to “R BECERRA, 302 7TH STREET, HOBOKEN, NJ 07030” to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail.

SUMMARY OF PETITIONER’S POSITION

14. Petitioner argues that the Division failed to properly mail the notice to her last known address, that she did not receive the notice, and that the Division did not follow its standard procedures. To support her argument, petitioner submitted, among other items, a printout purporting to show USPS tracking information for tracking number 71041002973000363491. The printout indicates, in part, that an item arrived at a USPS facility in Albany, New York

12288, on October 20, 2016; on October 24, 2016, “Notice Left (No Authorized Recipient Available)” at an address in Delray Beach, Florida 33446; on November 22, 2016, the item was “Unclaimed” and an address in Delray Beach, Florida 33446, and “Being Returned to Sender;” and that “Your item has been delivered to the original sender at 2:55 pm on December 1, 2016 in Brooklyn, NY 11201.” Petitioner did not present a foundational affidavit for the document.

Petitioner contends that because the CMR and the printout indicate different zip codes for where the notice arrived at a USPS facility, the Division did not follow its standard mailing procedures.

Petitioner further argues that the Division failed to properly issue the notice to petitioner’s former representative, contending that the representative’s proper address was, “Mr. Reinaldo Becerra, Becerra & Assoc., P.A., 302 7th Street, Hoboken, NJ 07030,” rather than the address listed on the notice as “R BECERRA, 302 7TH STREET, HOBOKEN, NJ 07030.” Petitioner also argues that the Division did not timely file an amended answer to the amended petition, and as such, according to petitioner, summary determination should be granted in petitioner’s favor.

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). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). 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]).

Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], *quoting Zuckerman*). In this case, as the issue is whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a statutory notice, including the notice at issue here (Tax Law §§ 170 [3-a] [a]; 689; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's and her former representative's last known address on October 20, 2016. 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 2015 resident income tax return, which satisfies the "last known address" requirement. Additionally, the address on the mailing cover sheet and CMR of the notice mailed to petitioner's former representative conform with the address listed for the former representative on petitioner's 2015 return. It is thus concluded that the Division properly mailed the notice on October 20, 2016, 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]; 689 [b]).

F. Petitioner's argument that the notice was not mailed to her last known address is not supported by the record. Contrary to petitioner's argument, the Division mailed the notice to petitioner's last known address in accordance with Tax Law § 691 (b), which provides that the "last known address" is the "address given in the last filed return by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address." The Division mailed the notice to the address given in petitioner's 2015 return, which was the last return filed by petitioner before the issuance of the notice. Petitioner has presented no evidence that she notified the Division of a change of address prior to the issuance of the notice. Further, contrary to petitioner's argument that the Division "knew, or should have known" of petitioner's alleged new address, Tax Law § 691 (b) clearly places the burden on the taxpayer to inform the Division of a change of address. There is no evidence in the record that

petitioner notified the Division of a different address than that reported in her 2015 return prior to the date the notice was issued.

Petitioner further argues that the Division's motion should be denied, contending that she did not receive the notice and that the notice was returned to sender. In support of this argument, as well as her argument that the Division did not follow standard procedures for delivering mail to the USPS, petitioner submitted a printout purportedly from a USPS website.

Petitioner's arguments are rejected. Tax Law § 681 (a) requires the Division to send notice by certified or registered mail when it determines that there is a deficiency in income tax. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v State Tax Commn.*, 72 Misc 2d 929 [1972], *affd* 43 AD2d 815 [3rd Dept 1973], *appeal dismissed* 34 NY2d 667 [1974]). "In effect, if the notice is properly mailed, the statute places the risk of nondelivery on the taxpayer" (*Matter of Malpica*). Petitioner's failure to receive the subject notice is "immaterial" (*Matter of Townley*, Tax Appeals Tribunal, January 25, 2018; *Matter of Kenning*). Thus, even construing the evidence in a light most favorable to petitioner and assuming that petitioner did not receive the notice, no hearing is required as a matter of law, because receipt is not required.

Additionally, the USPS printout relied upon by petitioner does not establish a material, arguable issue of fact regarding the Division's proper mailing of the notice (*see Matter of Ahmed*, Tax Appeals Tribunal, June 29, 2017). There was no evidentiary foundation for the printout submitted in support of petitioner's allegation that the Division failed to follow its standard procedures in mailing the notice. Petitioner did not submit an affidavit from one with

knowledge of USPS procedures to explain how the entries in the printout were compiled or what they mean. As no additional information regarding the parameters of the USPS database that was queried in producing the document was included with petitioner's submission, the printout does not raise a material question of fact regarding the Division's mailing of the statutory notice (*see Matter of Ahmed*). Petitioner's unsubstantiated allegations and assertions interpreting the printout and the meaning of the various entries are insufficient to overcome the Division's mail proof (*see Whelan v GTE Sylvania*). The Division has met its burden of proving proper mailing through the properly completed CMR and supporting affidavits from employees with knowledge of the Division's mailing procedures.

G. Petitioner next argues that the notice was not properly mailed to petitioner's former representative. Petitioner contends that the address for the representative was improper, in that it did not include "Becerra & Associates" and only listed the representative as "R Becerra" at the address listed on the notice. Contrary to petitioner's argument, the Division used the exact address listed for her former representative on the 2015 return, which, as noted, was petitioner's last filed return before the issuance of the notice. Specifically, petitioner's last filed return reports the address of petitioner's former representative as "R Becerra, 302 7th Street, Hoboken, NJ, 07030." This same address was listed on the subject notice. As such, petitioner's argument that the notice was not properly mailed to petitioner's former representative is without merit.

H. Petitioner also argues that the Division did not timely file an amended answer to petitioner's amended petition, and as such, according to petitioner, the allegations in the amended petition should be deemed admitted and summary determination should be granted in petitioner's favor. The rules of practice and procedure provide that:

“[n]o amendment shall be allowed under this subdivision after the expiration of the time for filing the petition, if such amendment would have the effect of conferring jurisdiction on the division of tax appeals over a matter which otherwise would not come within its jurisdiction under the petition as then on file” (20 NYCRR 3000.4 [d] [1]).

The original petition was filed on February 21, 2017, which was more than ninety days after the issuance of the notice at issue. The Division has presented sufficient proof to establish that the notice was properly mailed to petitioner and petitioner’s representative on October 20, 2016. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition (*see Matter of Voelker; Matter of Sak Smoke Shop*). Petitioner’s argument that the allegations in the amended petition should be deemed admitted and summary determination should be granted in petitioner’s favor would confer jurisdiction on the Division of Tax Appeals where no jurisdiction exists in the first instance. Such result is clearly prohibited by the regulations and is accordingly rejected.

I. As noted above, the Division brought the present matter as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). The standard of review for both such motions is the same (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). As discussed above, the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition and the Rules of Practice and Procedure provide for the dismissal of such a petition pursuant to a motion to dismiss (20 NYCRR 3000.9 [a] [ii]). Accordingly, the Division’s motion to dismiss is granted, and the motion for summary determination is thereby rendered moot (*Matter of Urrego; Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015).

J. The Division's motion to dismiss is hereby granted, the notice dated October 20, 2016 is sustained, petitioner's cross-motion is denied, and the petition is denied.

DATED: Albany, New York
August 30, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE