

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANCINE HOLT : DETERMINATION
for Redetermination of Deficiencies or for Refunds of New : DTA NO. 828398
York State Personal Income Taxes under Article 22 of the :
Tax Law for the Periods Ended September 30, 2005 and :
December 31, 2006, and for Review of a Notice of :
Proposed Driver License Suspension Referral under :
Tax Law § 171-v. :
:

Petitioner, Francine Holt, filed a petition for redetermination of deficiencies or for refunds of New York State personal income taxes under article 22 of the Tax Law for the periods ended September 30, 2005 and December 31, 2006, and for review of a notice of proposed driver license suspension referral under Tax Law § 171-v.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (James Passineau, Esq., of counsel), brought a motion dated June 14, 2019, 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 pro se, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on July 15, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, 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 notices of deficiency.

FINDINGS OF FACT

1. On July 15, 2017, petitioner faxed a request for a conciliation conference to the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of two notices of deficiency, each dated September 10, 2007, and bearing assessment identification number L-029147006 and L-029147007 (the notices). The request for conciliation conference also protested a notice of proposed driver license suspension referral under Tax Law § 171-v dated October 18, 2013 (60-day notice).

2. The notices are addressed to petitioner, Francine Holt, at an address in Baldwin, New York, and assert personal income (withholding) tax due for the periods ended September 30, 2005 and December 31, 2006.

3. On August 4, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner that dismissed petitioner's protest of the notices as untimely filed. On that same date, a separate conciliation order dismissing request was also issued to petitioner that dismissed her protest of the 60-day notice as untimely filed.

4. Petitioner filed a petition on October 2, 2017, with the Division of Tax Appeals in protest of the conciliation orders.

5. The Division filed its answer to the petition which denied all the allegations of fact and error contained in the petition and alleged that petitioner had no legal basis upon which to challenge the 60-day notice and alleged that the Division of Tax Appeals lacked jurisdiction to

hear the merits of the petition with respect to the notices. Thereafter, on June 24, 2019 the Division filed the instant motion.

6. The Division's motion papers indicate that the 60-day notice has been rescinded by the Division and therefore, that part of the petition challenging the 60-day notice has been rendered moot. The subject of the Division's motion is the timeliness of petitioner's protest of the notices.

7. To show proof of proper mailing of the notices, the Division provided the following with its motion papers: (i) an affidavit, dated June 1, 2018, of James M. Passineau, Esq., an attorney employed in the Division's Office of Counsel; (ii) an affidavit, dated February 20, 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 September 10, 2007; (iv) an affidavit, dated March 12, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (v) copies of the notices with the associated mailing cover sheets addressed to petitioner; (vi) a copy of petitioner's request for conciliation conference; and (vii) a copy of petitioner's personal income tax return (form IT-201), filed for the year 2006 by petitioner on April 15, 2007. The 2006 form IT-201 was the last return filed with the Division by petitioner before the notices were issued.

8. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, 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 pages of the CMR in the present case to the actual mailing date of "9/10/07." 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.

9. 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 Division's 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."

10. The September 10, 2007 CMR consists of 6 pages and lists 58 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 6 which contains 3 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 September 10, 2007 to each page of the CMR,

wrote the number “58” on page 6 next to the heading “Total Pieces Received at Post Office.”

The USPS representative also initialed or signed each page of the CMR.

11. Page 4 of the CMR indicates that notices with certified control numbers 7104 1002 9730 0277 6558 and 7104 1002 9730 0277 6565, and reference numbers L-029147006 and L-029147007, respectively, were mailed to petitioner at the Baldwin, New York, address listed on the notices (*see* finding of fact 2). This address matches the address listed on petitioner’s 2006 form IT-201. The corresponding mailing cover sheets, attached to the Picard affidavit, bear these certified control number and petitioner’s name and address as noted.

12. The affidavit of Fred Ramundo describes the general operations and procedures of the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. Mr. Ramundo notes that these procedures have remained essentially unchanged since 1992. The mail room 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. 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 personnel further request 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. As noted, each of the 6 pages of the CMR attached to the Picard affidavit contains a USPS postmark dated September 10, 2007. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials indicate that all of the 58 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on September 10, 2007.

13. According to the Picard and Ramundo affidavits, the notices were mailed to petitioner's last known address on September 10, 2007, as claimed.

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 a conciliation conference. This order shall address the instant motion as such.

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, Inc. 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], citing *Zuckerman*).

D. Petitioner did not respond to the Division’s motion. Accordingly, she is deemed to have conceded 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 [1ST Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Picard and Ramundo 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 (*see Tax Law* §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “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 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, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

G. In this case, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on September 10, 2007. 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 sheets and CMR matches the address listed on petitioner's 2006 form IT-201, which, satisfies the "last known address" requirement. It is thus concluded that the Division

properly mailed the notice on September 10, 2007, 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 (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]).

H. Petitioner's request for conciliation conference was filed with BCMS on July 15, 2017. This date falls well after the 90-day period of limitation for the filing of such a request. Consequently, the request was untimely (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]) and the same was properly dismissed by the conciliation order issued by BCMS. Petitioner has offered no claim or evidence to meet her 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 petition is denied,¹ and the August 4, 2017 conciliation order dismissing petitioner's request for conciliation conference is sustained.

DATED: Albany, New York
October 10, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

¹ As noted in finding of fact 6, the October 18, 2013 notice of proposed drivers license suspension referral was rescinded by the Division. As a result, that portion of the petition challenging this notice has been rendered moot.