

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ELY SPIVACK : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 828509
York State Personal Income Tax Under Article 22 of the :
Tax Law for the Periods Ended September 30, 2016 and :
December 31, 2016. :

Petitioner, Ely Spivack, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the periods ending September 30, 2016 and December 31, 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), brought a motion dated June 14, 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 Sullivan & Associates Law Firm, PC (John W. Sullivan, III, Esq.), submitted a response to the Division of Taxation's motion on July 12, 2018. The 90-day period for issuance of this determination commenced on July 16, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of deficiency.

II. 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of two notices of deficiency (notices), dated February 1, 2017 and April 12, 2017, and bearing assessment identification numbers L-046025130 and L-046151507, respectively. The notices are addressed to petitioner, Ely Spivack, at an address in New York, New York.

2. On August 24, 2017, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of only the April 12, 2017 notice (L-046151507).

3. On September 8, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the April 12, 2017 notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on April 12, 2017, but the request was not received until August 24, 2017, 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 both notices on December 5, 2017.

5. To show proof of proper mailing of notice of deficiency number L-046025130, the Division provided the following with its motion papers: (i) an affidavit, dated May 1, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 1, 2017; (iii) an affidavit, dated May 4, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the February 1, 2017 notice with the associated mailing cover sheet addressed to petitioner; and (v) a copy of petitioner's electronically filed 2015 New York resident income tax return, filed on April 2, 2016, which lists the same address for petitioner as that listed on both notice and the petition. The 2015 income tax return was the last return filed with the Division by petitioner before this notice was issued.

6. To show proof of proper mailing of notice of deficiency number L-046151507, the Division provided the following with its motion papers: (i) an affidavit, dated May 1, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 12, 2017; (iii) an affidavit, dated May 4, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the April 12, 2017 notice with the associated mailing cover sheet addressed to petitioner; and (v) a copy of petitioner's request for conciliation conference, filed with BCMS on August 24, 2017; and (vi) a copy of petitioner's electronically filed 2016 New York resident income tax return, filed on March 18, 2017, which lists the same address for petitioner as that listed on both notices, the request for conciliation conference and the petition. The 2016 income tax return was the last return filed with the Division by petitioner before this notice was issued.

7. The affidavits 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, set 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 CMRs in the present case to the actual mailing dates of "2/1/17" and "4/12/17." 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."

9. The February 1, 2017 CMR consists of 30 pages and lists 328 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 30, which includes 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 February 1, 2017 to each page of the CMR, wrote and circled the number “328” on page 30 next to the heading “Total Pieces Received at Post Office” and initialed or signed page 30.

10. Page 2 of the February 1, 2017 CMR indicates that a notice with certified control number 7104 1002 9730 0091 6536 and reference number L-046025130 was mailed to petitioner at the New York, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. The April 12, 2017 CMR consists of 18 pages and lists 189 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 18, which includes 2 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 April 12, 2017 to each page of the CMR, wrote and circled the number “189” on page 18 next to the heading “Total Pieces Received at Post Office” and initialed or signed page 18.

12. Page 1 of the April 12, 2017 CMR indicates that a notice with certified control number 7104 1002 9730 0107 1739 and reference number L-046151507 was mailed to petitioner at the

New York, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

13. The affidavits of Fred Ramundo describe the general operations and procedures followed in 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. Notices such as those at issue are received in the Division’s mail room and are placed in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A mail room 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 with the address and certified number from the mailing cover sheet showing through the windows. 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 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.

14. As noted, each of the 30 pages of the February 1, 2017 CMR attached to the Picard affidavit as Exhibit “A” contains a USPS postmark dated February 1, 2017. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all of

the 328 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on February 1, 2017.

15. Additionally, each of the 18 pages of the April 12, 2017 CMR attached to the Picard affidavit as Exhibit “A” contains a USPS postmark dated April 12, 2017. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all of the 189 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on April 12, 2017.

16. According to the Picard and Ramundo affidavits, the notices were mailed to petitioner on February 1, 2017 and April 12, 2017, as claimed.

17. Petitioner’s response to the Division’s motion, dated July 12, 2018, claims that he never received the notices and therefore, was unaware of his appellate rights.

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).

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. 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]; 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).

E. Where, as here, the timeliness of a taxpayer's protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order 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 (*see 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). Where a notice of deficiency has been properly mailed, Tax Law § 681 (a) does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

F. 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*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*).

G. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on February 1, 2017 and April 12, 2017. The CMRs have been properly completed and therefore constitute highly probative documentary evidence of both the dates 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 CMRs 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 CMRs conforms with the address listed on petitioner's 2015 and 2016 e-filed resident income tax returns, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on February 1, 2017 and April 12, 2017, 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 those dates (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]).

H. In sum, the Division has established that notices of deficiency L-046025130 and L-046151507 were properly mailed as addressed to petitioner, at his last known address, on February 1, 2017 and April 12, 2017, respectively. Having established that the notices of deficiency were properly mailed, it was incumbent upon petitioner to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter.

I. With regard to the February 1, 2017 notice, assessment number L-046025130, petitioner did not file a request for conciliation conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until December 5, 2017, a date that falls beyond 90 days after the date of issuance of the notice. Accordingly, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

J. Petitioner did file a request for conciliation conference with BCMS, for the April 12, 2017 notice, assessment number L-046151507, on August 24, 2017. This date falls 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 September 8, 2017 conciliation 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.

K. The Division's motion is hereby granted. The petition is dismissed with regard to the February 1, 2017 notice, assessment number L-046025130, as indicated in Conclusion of Law I. The petition is denied with regard to the April 12, 2017 notice, assessment number L-046151507, and the September 8, 2017 conciliation order dismissing petitioner's request is sustained, as indicated in Conclusion of Law J.

DATED: Albany, New York
October 11, 2018

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE