

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROSALBA PEREZ : DETERMINATION
DTA NO. 828579
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Tax Under :
Article 22 of the Tax Law and New York City :
Administrative Code for the Year 2013.

Petitioner, Rosalba Perez, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and New York City administrative code for the year 2013.

On December 10, 2018, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), filed a motion seeking summary determination pursuant to 20 NYCRR 3000.5 and 3000.9. Accompanying the motion was the affidavit of Colleen McMahon, Esq., dated December 7, 2018, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion. Accordingly, the 90-day period for issuance of this determination began on January 9, 2019, the due date of petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 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, dated November 17, 2016, and addressed to petitioner, Rosalba Perez, "493 E 166TH ST APT 2A, BRONX, NY 10456-5368." The notice of deficiency, notice number L-045498104, asserted additional New York State personal income tax for the year 2013 in the amount of \$1,915.00, plus interest, for a balance due of \$2,325.84. The mailing cover sheet of the notice of deficiency contains the certified control number 7104 1002 9735 3318 9698.

2. Petitioner protested the notice of deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a request for conciliation conference (Request), hand-dated and signed by petitioner on September 22, 2017. The envelope in which the Request was mailed by United States Postal Service (USPS) first class mail bears a USPS postmark of September 22, 2017. BCMS received the Request on September 25, 2017. The Request lists petitioner's address as the Bronx, New York, address.

3. On October 20, 2017, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 000300069, to petitioner. The conciliation order determined that petitioner's protest of the 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 November 17, 2016, but the request was not mailed until September 22, 2017, or in excess of 90 days, the request is late filed."

4. On January 30, 2018, the Division of Tax Appeals received a petition seeking review of the conciliation order issued in this matter. The envelope in which the petition was sent bears a USPS postmark of January 26, 2018.

5. On April 30, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition, pursuant to 20 NYCRR 3000.9 (a) (4), on the ground that the petition did not appear to be timely filed. By an order, dated October 11, 2018, the undersigned administrative law judge rescinded the notice of intent to dismiss petition, because the Division did not present any evidence to establish proper mailing of the subject conciliation order dismissing request. This order also directed the Division to file its answer within 75 days of the date of the issuance of the same.

6. The Division filed its answer to the petition on October 31, 2018. The Division, in turn, filed a notice of motion and supporting papers on December 10, 2018, seeking summary determination pursuant to 20 NYCRR 3000.5 and 3000.9.

In support of its motion, the Division submitted: (i) an affidavit, dated December 7, 2018, of Colleen McMahon, Esq., an attorney employed in the Division's Office of Counsel; (ii) an affidavit, dated June 29, 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 copy of a "Certified Record For - DTF-962-F-E - Not of Def Follow Up" (CMR); (iv) an affidavit, dated July 9, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (v) a copy of the November 17, 2016 notice with the associated cover sheet addressed to petitioner; (vi) a copy of petitioner's request for conciliation conference, filed with BCMS on September 22, 2017; (vii) an affidavit, dated June 26, 2018, of Heidi Corina, a Legal Assistant 2 in the

Division's Office of Counsel; (viii) a Request for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the USPS response to such request dated June 25, 2018; and (ix) a copy of petitioner's 2015 New York State resident income tax return (form IT-201), electronically filed on January 31, 2016, which was the last return filed with the Division prior to the issuance of this notice.

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, as the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, 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 "11/17/16." 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 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. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures is a discrete unit within the batch of notices, and the mailing cover sheet is the first sheet in the unit.

9. The CARTS-generated CMR for each batch of notices lists each notice in the order the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled "Certified No." 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 CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

10. The November 17, 2016 CMR consists of 18 pages and lists 246 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes between 10 and 15 such 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.

11. Page 5 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 3318 9698, and reference number L-045498104, was mailed to petitioner at the Bronx, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this same certified control number and petitioner's name and address as noted.

12. The affidavit of Fred Ramundo, a supervisor in the Division's mail room and whose current title is Stores and Operations Supervisor, 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. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope, so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and places postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information listed on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee then affixes his or her initials or signature and a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. 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.

13. 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, the CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention.

14. Each page of the CMR bears two postmarks of the Colonie Center, New York, branch of the USPS, one dated November 17, 2016 and one dated November 18, 2016. Appearing below the 10 entries on page 18 of the CMR is the preprinted heading "TOTAL PIECES AND AMOUNTS," next to which the preprinted number "246," and the circled, handwritten number "246" appear. The initials of a USPS employee appear near the two postmarks stamped on each page of the CMR. According to Mr. Ramundo, the affixation of the postmarks, the USPS employee's initials and the circled, handwritten number "246" indicate that all of the 246 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on November 17, 2016.

15. Regarding the postmarks of November 17, 2016 and November 18, 2016 appearing on each page of the CMR, Mr. Ramundo avers that the postmark of November 18, 2016 was erroneously applied. He further avers that when such an error in the date occurs, a USPS employee may catch the mistake or a member of the mail room staff may catch the error and request that the CMR be corrected to properly reflect the date of mailing.

16. Based upon his review of the affidavit of Ms. Picard, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on November 17, 2016, an employee of the mail room delivered an item of certified mail addressed to "PEREZ-ROSALBA, 493 E 166TH ST APT 2A, BRONX, NY 10456-5368 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 the mail room staff obtained the CMR delivered to and accepted by the USPS on November 17, 2016 to be kept as part of the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the mail room 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 petitioner on November 17, 2016.

17. 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 9735 3318 9698 on November 17, 2016, from the Colonie Center, New York, branch of the USPS to “Perez-Rosalba” at a Bronx, New York, address. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 3318 9698 on November 19, 2016 at 12:51 p.m. in Bronx, New York 10456. The scanned image of the recipient’s signature as shown on the USPS response is illegible. The scanned address of the recipient indicates the same Bronx, New York, address as listed on the notice.

18. Petitioner’s 2015 resident income tax return, electronically filed on January 31, 2016, reported her address as East 166th Street, Bronx, New York 10456. This was the last return filed by petitioner prior to the issuance of the subject notice of deficiency. This address corresponds with the address appearing on the CMR, the notice of deficiency, the Request and the petition.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules).

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*, 99 AD2d 227 [1st Dept 1984] *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Picard, Ramundo, or Corina 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 (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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer’s last known address (Tax Law § 681 [a]),

and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

F. The Division may meet its burden of proving proper mailing by providing 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). 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 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*, Tax Appeals Tribunal, November 14, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Piccard and Mr. Ramundo, 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). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the notice of deficiency was mailed by certified mail addressed to petitioner on November 17, 2016. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the notice of deficiency issued to petitioner. Petitioner's name and address, as well as the numerical information of the notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS postmark of November 17, 2016, an erroneous USPS postmark of November 18, 2016, and the initials of the USPS employee near such postmarks. There are 246 certified control

numbers listed on the CMR for November 17, 2016, and the USPS employee who initialed the CMR indicated by writing and circling the number “246” next to the heading “TOTAL PIECES AND AMOUNTS” that 246 items were received for mailing. 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 November 19, 2016 (*see* finding of fact 17).

H. The Division established that the notice of deficiency was mailed to petitioner’s last known address, being the same address reported on petitioner’s 2015 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 18). 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 November 17, 2016 (Tax Law §§ 170 [3-a] [a]; 681 [b]).

I. The documents show that the notice of deficiency was mailed on November 17, 2016, but petitioner’s request for conciliation conference was not mailed until September 22, 2017, a date well beyond the 90-day period for protesting the notice of deficiency. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*).

J. Finally, it is observed that petitioner is not 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 hereby granted, the petition of Rosalba Perez is denied and the October 20, 2017 Conciliation Order Dismissing Request is sustained.

DATED: Albany, New York
April 4, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE