

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FREDERICK M. OBERLANDER : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 828957
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2013. :

Petitioner, Frederick M. Oberlander, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), brought a motion dated February 19, 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 by Tenenbaum Law P.C. (Leo Gabovich, Esq., of counsel), filed his response to the Division of Taxation's motion on April 25, 2019, 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, Donna M. Gardiner, 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 Division of Taxation (Division) brought a motion dated February 19, 2019 for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated February 20, 2018, and bearing assessment identification number L-047739184 (notice). The notice is addressed to petitioner, Frederick M. Oberlander, at an address in Montauk, New York. A notice and demand for payment of tax due was issued to petitioner on June 7, 2018, for assessment identification number L-047739184, and addressed to the same Montauk, New York, address as the notice.

2. On September 24, 2018, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On October 19, 2018, BCMS issued a conciliation order dismissing request (conciliation order) 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 February 20, 2018, but the request was not received until September 24, 2018, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on November 1, 2018.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affidavit of Charles Fishbaum, sworn to on February 19, 2019, the following with its motion papers: (i) an affidavit, dated December 13, 2018, of Deena Picard,

a Data Processing Fiscal Systems Auditor 3 and the 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 20, 2018; (iii) an affidavit, dated December 14, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the notice mailed to petitioner and his former representative with the associated mailing cover sheets; (v) a power of attorney form marked as received by the BCMS on July 6, 2017, for personal income tax for the year 2013, listing petitioner's former representative, K. Craig Reilly, Esq., with a New York, New York, address; (vi) a copy of petitioner's request for conciliation conference, stamped as received by BCMS on September 24, 2018; (vii) a copy of the conciliation order issued by BCMS on October 19, 2018; and (viii) a copy of petitioner's 2013 New York state resident income tax return, form IT-201, filed on July 3, 2017. The tax return filed on July 3, 2017 was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director 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 pages of the

CMR in the present case to the actual mailing date of “2/20/18.” 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.

7. 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.”

8. The CMR in the present matter consists of 17 pages and lists 183 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 17, which contains 7 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 20, 2018, to each page of the CMR, wrote the number “183” on page 17 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 17.

9. Page five of the CMR indicates that a notice with certified control number 7104 1002 9730 0222 8330 and reference number L-047739184 was mailed to petitioner’s former

representative at the New York, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and Mr. Reilly's name and address as noted. Page 11 of the CMR indicates that a notice with certified control number 7104 1002 9730 0222 9030 and reference number L-047739184 was mailed to petitioner at the Montauk, New York, address listed on the notice. The corresponding mailing cover sheet, also attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes the mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. 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 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 February 20, 2018. On page 17, corresponding to “Total Pieces and Amounts,” is the preprinted number 183 and next to “Total Pieces Received At Post Office” is the handwritten entry “183.” There is a set of initials or a signature on page 17. According to the Picard and Ramundo affidavits, copies of the notice were mailed to petitioner and his former representative on February 20, 2018, as claimed.

11. The petition and petitioner’s response to the Division’s motion, filed on April 25, 2019, assert that prior to the issuance of the February 20, 2018 notice at issue in this matter, the Division had issued a prior notice of deficiency for personal income tax for the year 2013 (original notice). In response to the original notice, petitioner argues that his former representative filed a request for conciliation conference, dated July 3, 2017, and a power of attorney form, authorizing his representation for personal income tax for the period 2013, which BCMS received on July 6, 2017. The power of attorney lists Mr. Reilly’s address as a New York, New York, address, however, the request for conciliation conference lists Mr. Reilly’s address as a Buffalo, New York, address. Also on July 3, 2017, petitioner filed his form IT-201 for the tax year 2013. In response to this filing, the Division canceled the original notice and it is not at issue.

12. Petitioner included in his submission, a copy of page 5 of the February 20, 2018 CMR, along with what purports to be a USPS tracking printout for certified number 7104 1002 9730 0222 8330. The printout states that delivery of the certified article was attempted at a New York, New York, address but was undeliverable, “moved, left no address” and was delivered to the original sender in Albany, New York, on March 5, 2018. A copy of page 11 of the CMR was also included, with what purports to be a USPS tracking printout for certified number 7104 1002

9730 0222 9030. The printout states that the certified article was delivered to the original sender in Albany, New York, on March 20, 2018.

CONCLUSIONS OF LAW

A. The Division has filed an alternative motion, seeking dismissal under 20 NYCRR 3000.9 (a), or summary determination under 20 NYCRR 3000.9 (b). As the Division of Tax Appeals has subject matter jurisdiction on the issue of the timely filing of a request for a conciliation conference in the instant matter, the Division's motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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 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. 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 of deficiency 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 merits of the protest (*see* Tax Law § 681 [b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. 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 mail of the subject statutory notice 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 the 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*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).”

E. The Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., February 20, 2018, to petitioner's last known address and to his former representative's last known address. 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 for each recipient and on the CMR conforms with the address listed on petitioner's New York State income tax return for the year 2013 and the power of attorney form,

respectively, which satisfied the “last known address” requirement in Tax Law § 681 [a]. It is concluded that the notice was properly mailed to both petitioner and his former representative on February 20, 2018 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 argues that the Division mailed a copy of the notice to an incorrect address for him and an incorrect address for his former representative. Petitioner states that the request for a conciliation conference, protesting the original notice, set forth a Buffalo, New York, address for his former representative and, as such, the request put the Division on notice that the address had been changed. Petitioner concedes that he used an incorrect P.O. box number to reflect his own address on his form IT-203 for 2013 which resulted in the Division using this incorrect box number on the notice.

This argument is without merit. As noted in the facts above, the original notice was canceled and, thus, no request for a conciliation conference was processed. Moreover, petitioner completed his form IT-203 for the tax year 2013 on the same day that he filed his request for a conciliation conference and the power of attorney form attached to the tax return had petitioner’s former representative’s address listed as the New York, New York, address. This power of attorney form executed by his former representative and filed with petitioner’s form IT-203 constitutes the last known address for the former representative and the Division has established that the notice was properly mailed to him at that address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003). Similarly, although petitioner mistakenly indicated an incorrect P.O. box number for his own

mailing address, the Division was authorized to rely on that address as petitioner's last known address.

G. Petitioner also notes that the notices were not received as indicated by the USPS tracking information for the certified control numbers set forth on the tracking information document. The Division has established proper mailing of the notices to both petitioner and his former representative. Tax Law § 681 does not require actual receipt by the taxpayer (*Matter of Lippman*, Tax Appeals Tribunal, March 3, 2011; *see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Generally, the Division is entitled to rely on the address listed on the last return filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (*Matter of Feliciano*). Petitioner has not established that he informed the Division of any errors in address prior to the issuance of the notice. Therefore, the Division has established proper mailing of the notices in this matter.

H. It is concluded that the notice was properly mailed to petitioner and his then-representative on February 20, 2018, 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]). Petitioner's request was filed on September 24, 2018. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the October 19, 2018 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.

I. The Division of Taxation's motion for summary determination is granted, the petition of Frederick M. Oberlander is denied, and the conciliation order dismissing request, dated October 19, 2018, is sustained.

DATED: Albany, New York
July 18, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE