

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
IOAN STOICA : DETERMINATION
for Revision of Deficiencies or for Refund of Tax : DTA NO. 829226
under Article 29-A of the Tax Law for the :
Period October 1, 2016 through March 31, 2018. :
.

Petitioner, Ioan Stoica, filed a petition for Revision of deficiencies or for refund of tax under article 29-A of the Tax Law for the period October 1, 2016 through March 31, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), brought a motion, dated January 31, 2020, for an order granting summary determination in the above-referenced matter pursuant to sections 3000.5 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 motion. 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

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of six notices of estimated deficiency assessing tax due as imposed under section 1281 of Tax Law article 29-A.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner’s protest of the following six notices of estimated deficiency (notices):

Notice #	Period Ending	Notice Date
L-046071079	12/31/2016	02/22/2017
L-046432415	03/31/2017	05/17/2017
L-046953521	06/30/2017	08/16/2017
L-047598823	09/30/2017	01/16/2018
L-047734818	12/31/2017	02/15/2018
L-048182601	03/31/2018	05/31/2018

The notices were addressed to petitioner, Ioan Stoica, at an address in Sunnyside, New York.

2. Petitioner filed a petition with the Division of Tax Appeals in protest of the foregoing notices on March 7, 2019. The petition indicates that petitioner did not request a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS).

3. To show proper mailing of the notices, the Division’s motion included accompanying documents pertaining to the process of generating and mailing each of the such notices, as follows:

a) notice of estimated deficiency, L-046071079, dated February 22, 2017:

(i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS), dated June 14, 2019; (ii) a “Certified Record for Presort Mail – Assessments Receivable” (CMR) postmarked February 22, 2017; (iii) an affidavit of Fred Ramundo, a supervisor in the Division’s mail room, dated June 17, 2019; (iv) a copy of the February 22, 2017 notice with the associated mailing cover sheet addressed to petitioner; and (v) a copy of petitioner’s 2015 e-filed IT-201 resident income tax return (form IT-201), filed on March 5, 2016, which according to the affirmation filed by the Division’s representative, Anita Luckina, was the last return filed with the Division by petitioner before the notice was issued. The Division also provided with its motion papers, a printout from the United States Postal Service (USPS) website, entitled “Look Up A Zip Code,” which reflects that petitioner’s Sunnyside, New York, address, with the zip code “11104-2418,” as petitioner listed

it on each of his tax returns, corresponds to the identical USPS mailing address with zip code "11104-1436." The USPS verified address is the address to which the each of the notices were mailed.

b) notice of estimated deficiency, L-046432415, dated May 17, 2017:

(i) an affidavit of Deena Picard, dated June 14, 2019; (ii) a CMR entitled "Certified Record for Presort Mail – Assessments Receivable," postmarked May 17, 2017; (iii) an affidavit of Fred Ramundo, dated June 17, 2019; (iv) a copy of the May 17, 2017 notice with the associated mailing cover sheet addressed to petitioner; and (v) a copy of petitioner's 2016 e-filed form IT-201, filed on March 2, 2017, which lists the same address for petitioner as that listed on the notice and the petition (*see* finding of fact 3-a). According to Ms. Luckina's affirmation, the March 2, 2017, tax return was the last return filed with the Division by petitioner before the notice was issued.

c) notice of estimated deficiency, L-046953521, dated August 16, 2017:

(i) an affidavit of Deena Picard, dated June 14, 2019; (ii) a CMR entitled "Certified Record for Presort Mail – Assessments Receivable," postmarked August 16, 2017; (iii) an affidavit of Fred Ramundo, dated June 17, 2019; and (iv) a copy of the August 16, 2017 notice with the associated mailing cover sheet addressed to petitioner. According to Ms. Luckina's affirmation, the March 2, 2017 tax return noted earlier was the last return filed with the Division by petitioner before the notice was issued, and lists the same address as that listed on the notice and the petition (*see* findings of fact 3-a and b).

d) notice of estimated deficiency, L-047598823, dated January 16, 2018:

(i) an affidavit of Deena Picard, dated June 14, 2019; (ii) a CMR entitled "Certified Record for Presort Mail – Assessments Receivable," postmarked January 16, 2018; (iii) an affidavit of Fred Ramundo, dated June 17, 2019; and (iv) a copy of the January 16, 2018 notice with the associated mailing cover sheet addressed to petitioner. According to Ms. Luckina's affirmation, the March 2, 2017 tax return noted earlier was the last return filed with the Division by petitioner before the notice was issued, and lists the same address as that listed on the notice and the petition (*see* findings of fact 3-a, b and c).

e) notice of estimated deficiency, L-047734818, dated February 15, 2018:

(i) an affidavit of Deena Picard, dated June 14, 2019; (ii) a CMR entitled "Certified Record for Presort Mail – Assessments Receivable," postmarked February 15, 2018; (iii) an affidavit of Fred Ramundo, dated June 17, 2019; and (iv) a copy of the February 15, 2018 notice with the associated mailing cover sheet addressed to petitioner. According to Ms. Luckina's affirmation, the March 2, 2017 tax return was the last return filed with the Division by petitioner before the notice was issued,

and lists the same address as that listed on the notice and the petition (*see* findings of fact 3-a, b, c and d).

f) notice of estimated deficiency, L-048182601, dated May 31, 2018:

(i) an affidavit of Deena Picard, dated June 14, 2019; (ii) a CMR entitled “Certified Record for Presort Mail – Assessments Receivable,” postmarked May 31, 2018; (iii) an affidavit of Fred Ramundo, dated June 17, 2019; (iv) a copy of the May 31, 2018 notice with the associated mailing cover sheet addressed to petitioner; and (v) a copy of petitioner’s 2017 e-filed IT-201, filed on March 24, 2018, which lists the same address for petitioner as that listed on the notice and the petition (*see* finding of fact 3-a, b, c, d and e). According to Ms. Luckina’s affirmation, the March 24, 2018 tax return was the last return filed with the Division by petitioner before the notice was issued.

4. Each of the affidavits of Deena Picard, who has been in her current position since May 2017, and has been 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 familiar with the Division’s Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with 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 is manually changed on the first and last page of the CMR to the actual date of mailing. 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 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.

5. 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 P.O. ADDRESS."

6. The February 22, 2017 CMR consists of 138 pages and lists 1,513 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 138, which contains 6 entries. Ms. Picard notes that the copy of the CMR 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 22, 2017, to each page of the CMR, handwrote the number "1,513" on page 138 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed page 138.

7. Page 59 of the CMR indicates that a notice with certified control number 7104 1002 9730 0096 9877 and assessment ID number L-046071079 was mailed to petitioner at the Sunnyside, 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 petitioner's name and address, as noted.

8. The May 17, 2017 CMR consists of 131 pages and lists 1,432 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 131, which contains 2 entries. Ms. Picard notes that the copy of the CMR 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 May 17, 2017, to each page of the CMR, handwrote and circled the number "1432" on page 131 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed page 131.

9. Page 53 of the CMR indicates that a notice with certified control number 7104 1002 9730 0130 7760 and assessment ID number L-046432415 was mailed to petitioner at the Sunnyside, 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 petitioner's name and address as noted.

10. The August 16, 2017 CMR consists of 140 pages and lists 1,533 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 140, which contains 4 entries. Ms. Picard notes that the copy of the CMR 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 August 16, 2017, to each page of the CMR, handwrote the number "1,533" on page 140 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed each page of the CMR.

11. Page 59 of the CMR indicates that a notice with certified control number 7104 1002 9730 0159 1046 and assessment ID number L-046953521 was mailed to petitioner at the Sunnyside, 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 petitioner’s name and address as noted.

12. The January 16, 2018 CMR consists of 97 pages and lists 1,056 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 97, which contains zero entries. Ms. Picard notes that the copy of the CMR 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 January 16, 2018, to each page of the CMR, handwrote the number “1056” on page 97 next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and signed page 97.

13. Page 37 of the CMR indicates that a notice with certified control number 7104 1002 9730 0199 2935 and assessment ID number L-047598826 was mailed to petitioner at the Sunnyside, 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 petitioner’s name and address as noted.

14. The February 15, 2018 CMR consists of 134 pages and lists 1,464 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 134, which contains 1 entry. Ms. Picard notes that the copy of the CMR 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 15, 2018, to each page of the CMR, handwrote the number “1464” on page 134 next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed page 134.

15. Page 69 of the CMR indicates that a notice with certified control number 7104 1002 9730 0221 8584 and assessment ID number L-047734818 was mailed to petitioner at the Sunnyside, 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 petitioner's name and address as noted.

16. The May 31, 2018 CMR consists of 105 pages and lists 1,151 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 105, which contains 7 entries. Ms. Picard notes that the copy of the CMR 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 May 31, 2018, to each page of the CMR, handwrote the number "1,151" on page 105 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed each page of the CMR.

17. Page 43 of the CMR indicates that a notice with certified control number 7104 1002 9730 0254 1453 and assessment ID number L-048182601 was mailed to petitioner at the Sunnyside, 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 petitioner's name and address as noted.

18. Each of the affidavits of Fred Ramundo describe the general operations and procedures of the Division's mail room. Mr. Ramundo has been a supervisor in the mail room 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

retrieves 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 contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branch offices 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 USPS employee initialed each page of the respective CMRs and affixed a postmark to each page of the respective CMRs. 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. A review of the February 22, 2017, May 17, 2017, August 16, 2017, January 16, 2018, February 15, 2018 and May 31, 2018 CMRs indicate that the USPS employee complied with this request by handwriting or circling the number of pieces received.

19. According to all of the affidavits submitted, copies of the respective notices were properly mailed to petitioner at his Sunnyside, New York, address on the dates indicated as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Village 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 [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, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal 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 v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. There is a 90-day statutory time limit for filing a petition for a hearing following the issuance of a statutory notice giving rise to the right to a hearing (*see* Tax Law §§ 2006 [4];

1081; 1085). 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).¹

F. Where the timeliness of a taxpayer's protest of a statutory notice giving rise to the right to a hearing is in question, the initial inquiry is on the Division's mailing of the notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Tax Law § 1290, provides that article 27 of the Tax Law applies for purposes of administration and procedure with respect to the tax imposed by article 29-A. As such, it is appropriate to look to the provisions of article 27 with respect to the proper mailing of statutory notices issued by the Division and assessing the tax imposed under article 29-A.² Tax Law § 1081 (a) provides, in relevant part, that "[a] notice of deficiency shall be mailed by certified or registered mail to the taxpayer at its last known address in or out of this state." In turn, Tax Law § 1081 (b) provides that a challenge to a properly mailed notice must be filed within 90-days after such mailing.

G. 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).

¹ A taxpayer may challenge a statutory notice by either filing a request for a conciliation conference with BCMS, or a petition with the Division of Tax Appeals. In this instance, petitioner did not choose to file a request for a BCMS conference (*see* finding of fact 2), but rather filed a petition with the Division of Tax Appeals in the first instance.

² Tax Law §1281 imposed a tax of fifty cents on each medallion taxicab trip that originated in New York City and terminated anywhere within the territorial boundaries of the Metropolitan Commuter Transportation District (MCTD).

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*).

H. Here, the Division has offered proof sufficient to establish the mailing of each of the six notices to petitioner's last known address on February 22, 2017, May 17, 2017, August 16, 2017, January 16, 2018, February 15, 2018 and May 31, 2018, respectively. As specifically detailed in findings of fact 6 through 17, the relevant CMRs have been properly completed and therefore constitute highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In this regard, 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 conform with the address listed on petitioner's 2015, 2016 and 2017 resident income tax returns, filed with the Division on March 5, 2016, March 2, 2017 and March 24, 2018, respectively. The term "last known address" is defined as "the address given in the last return filed by [the taxpayer], unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address" (Tax Law § 1091 [b]). Each notice was mailed to the address petitioner provided to the Division on each of his last filed tax returns, thus satisfying the last known address requirement.³

³ It is noted that the Division verified petitioner's address, based on information from the section of the USPS website entitled "Look Up A Zip Code" (*see* finding of fact 3-a), confirming thereby that: a) the first five digits ("11104"), of the nine-digit zip code are identical on both the returns filed by petitioner and on the address used by the Division to mail the notices at issue, and b) that the last four digits of the nine-digit zip code set forth on each of petitioner's returns ("2418") correspond, for delivery address purposes, to the last four digits ("1436") of the nine-digit zip code set forth for petitioner's Sunnyside, New York, street and apartment number mailing address as appears on the USPS website and on petitioner's returns. Thus, the Division's use of the latter four digits was not

I. It is thus concluded that the Division properly mailed the notices when they were delivered into the custody of the USPS on February 22, 2017, May 17, 2017, August 16, 2017, January 16, 2018, February 15, 2018 and May 31, 2018. Since they were properly mailed, i.e., delivered into the custody of the USPS, addressed to petitioner at his last known address with the requisite amount of postage affixed, 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 (*see* Tax Law §§ 2006 [4]; 1081; 1085; 1091 [b]).

J. The Division has established that notices of estimated deficiency L-046071079, L-046432415, L-046953521, L-047598823, L-047734818 and L-048182601 were properly mailed as addressed to petitioner at his last known address on February 22, 2017, May 17, 2017, August 16, 2017, January 16, 2018, February 15, 2018 and May 31, 2018, respectively. Having established that the notices were properly mailed to petitioner, 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. 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 March 7, 2019, a date that falls well beyond 90 days after the dates of issuance of the notices. Thus, insofar as the petition seeks a hearing on the merits of the notices, it 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).

erroneous, and the address on the notices was, in fact, petitioner's last known address. Moreover, it is well established that the use of an erroneous zip code, including specifically an incorrect nine-digit zip code, is an inconsequential error (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

K. The Division's motion for summary determination is granted and the petition of Ioan Stoica is hereby dismissed.

DATED: Albany, New York
September 3, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE