

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
GILLIAN J. DUBOIS
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 the Administrative Code of the City of New
York for the Year 2017.

DETERMINATION
DTA NO. 829644

Petitioner, Gillian J. Dubois, 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 the Administrative Code of the City of New York for the year 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel) brought a motion dated July 8, 2020, 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) (1), and (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 August 7, 2020. 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 Division of Taxation (Division) brought a motion dated July 8, 2020 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 May 17, 2018, and bearing assessment identification number L-047864117 (notice). The notice is addressed to petitioner, Gillian J. Dubois, at an address in Maspeth, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9735 4249 9924.

2. On August 5, 2019, petitioner, via her then-representative Yehad Abdelaziz, The Five Pillars Group, filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On August 30, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order (CMS No. 000313685) 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 May 17, 2018, but the request was not received until August 5, 2019, or in excess of 90 days, the request is late filed.”

4. On October 5, 2019, a petition protesting the conciliation order was filed by petitioner.¹ The United States Postal Service (USPS) Priority Mail Flat Rate Envelope in which the petition was mailed bears a USPS Priority Mail 2-day postage label dated

¹ Although Mr. Abdelaziz was listed as petitioner's representative on the petition, he does not qualify to represent petitioner before the Division of Tax Appeals under 20 NYCRR 3000.2 (*see* Tax Law § 2014 [1]).

October 5, 2019. The petition lists petitioner's Maspeth, New York, address. There is no dispute that the petition was filed within 90 days after the August 30, 2019 issuance of the conciliation order and constitutes a timely challenge thereto.

5. In support of the motion and to show proof of proper mailing of the notice, the Division submitted the following with its motion papers: (i) an affidavit, sworn to July 8, 2020, of Peter B. Ostwald, Esq., the Division's representative; (ii) an affidavit, sworn to July 1, 2020, 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); (iii) a "Certified Record for – DTF-962-E – Not of Deficiency DTF-962-F-E – Not of Def Follow Up DTF-963-E – Notice of Determination DTF-963-F-E – Not of Det Follow Up" postmarked May 17, 2018; (iv) an affidavit, dated July 2, 2020, of Susan Saccocio, a manager in the Division's mail room; (v) a copy of the May 17, 2018 notice with the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference, faxed to BCMS on August 5, 2019; and (vii) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2017, electronically filed on March 18, 2018, which lists the same Maspeth, New York, address for petitioner as that listed on the notice, the request for conciliation conference, and the petition. The 2017 income tax return was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon, and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20181322200." 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 actual mailing date of "5/17/18." In addition, as described by Ms. Picard, generally 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.

7. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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 20 pages and lists 243 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 10 to 14 such entries, with the exception of page 20, which contains 5 entries. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark dated May 17, 2018 to each page of the CMR, wrote the number “243” on page 20 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 20.

9. Page 13 of the CMR indicates that a notice with certified control number 7104 1002 9735 4249 9924 and reference number L 047864117 was mailed to petitioner at the Maspeth, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio 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. As noted, each of the 20 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of May 17, 2018. On page 20, corresponding to "Total Pieces and Amounts" is the preprinted number 243 and next to "Total Pieces Received at Post Office" is the handwritten entry "243," indicating 243 pieces of mail were received by the USPS. There is a set of initials or a signature on page 20.

11. According to the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioner on May 17, 2018, as claimed.

12. Petitioner did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) of the Rules of Practice and procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was timely filed (*see* finding of fact 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 conciliation conference. This determination 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]). “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*). 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 Std. Metals*, 99 AD2d 227 [1st Dept 1984] *lv dismissed* 62 NY2d 942 [1984]).

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 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 hearing has not lapsed” (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).

E. Where the timelessness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified mail 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*).”

F. Here, the Division has offered sufficient proof to establish the mailing of the statutory notice to petitioner’s last known address on May 17, 2018. 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 and on the CMR conform with the address listed on petitioner’s New York State resident income tax return for the year 2017, which satisfies the “last known address” requirement in Tax Law § 681 (a). It is therefore concluded that the Division properly mailed the notice on May 17, 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 (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioner's request for conciliation conference, filed on August 5, 2019, was therefore untimely, and was properly dismissed by BCMS.

G. The Division of Taxation's motion for summary determination is granted, the petition of Gillian J. Dubois is denied, and the August 30, 2019 conciliation order issued by BCMS is sustained.

DATED: Albany, New York
November 5, 2020

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE