

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THOMAS ARMANDO BENITEZ : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 830216
New York State Personal Income Tax under Article 22 of :
the Tax Law for the Years 2012 and 2014. :

Petitioner, Thomas Armando Benitez, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2012 and 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion, filed on July 28, 2022, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, filed his reply to the motion on September 28, 2022, which date commenced 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 notices of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion on July 28, 2022, 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 two notices of deficiency, dated March 13, 2020. The first notice bears assessment identification number L-051181962 and was for the tax year 2012 and the second notice bears assessment identification number L-051181963 and was for the tax year 2014. The notices are addressed to petitioner at an address in the Bronx, New York.

2. On September 11, 2020, petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

3. On October 2, 2020, BCMS issued two conciliation orders dismissing request (conciliation orders) to petitioner, CMS No. 323046 for 2012 and CMS No. 323048 for 2014. The conciliation orders determined that petitioner's protest of the notices was not timely filed.

4. Petitioner filed a timely petition with the Division of Tax Appeals, on December 31, 2020 in protest of the conciliation orders.

5. In support of the motion and to show proof of proper mailing of the notices, the Division provided, along with an affirmation of Christopher O'Brien, Esq., dated July 28, 2022, the following with its motion papers: (i) an affidavit, dated July 21, 2022, 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 – DTF - 962-E - Not of Deficiency/DTF-962-F-E - Not of Def Follow Up" (CMR) postmarked March 13, 2020; (iii) an affidavit, dated July 21, 2022, of Susan Ramundo, a manager in the Division's mailroom; (iv)

a copy of the notices mailed to petitioner with the associated mailing cover sheets; (v) a copy of petitioner's request for conciliation conference, dated September 11, 2020, that reflects petitioner's Bronx, New York, address; and (vi) a copy of petitioner's New York resident income tax return, form IT-201, for the tax year 2011, filed October 15, 2015, that reflects petitioner's Bronx, New York, address. Petitioner's 2011 form IT-201 was the last return filed before issuance of the notices.

6. The affidavit of Deena Picard, who has been in her current position 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, indicated by Julian day of the year and military time of day of "20200672200." 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 "3/13/20." 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 459 pages and lists 6,384 certified control numbers along with corresponding assessment numbers, names and addresses. 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 March 13, 2020, to each page of the CMR, wrote the number "6384" on page 459 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 459.

9. Page 136 of the CMR indicates that a notice with certified control number 7104 1002 9735 5430 0577 and reference number L 051181962 and a notice with certified control number 7104 1002 9735 5430 0584 with reference number L 051181963 were mailed to petitioner at the Bronx, New York, address listed on the notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and petitioner's name and address as noted.

10. The affidavit of Susan Ramundo, a manager in the Division's mailroom, describes the mailroom's general operations and procedures. Ms. Ramundo 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. 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 mailroom 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" contained in the Picard affidavit has a USPS postmark date of March 13, 2020. On page 459, corresponding to "Total Pieces and Amounts," is the preprinted number 6,384 and next to "Total Pieces Received At Post Office" is the handwritten entry "6384." There is a set of initials or a signature on page 459.

11. According to the Picard and Ramundo affidavits, copies of the notices were mailed to petitioner on March 13, 2020, as claimed.

12. In opposition to the motion, petitioner submitted the following: (1) a sworn statement of Edward J. Benitez, petitioner's brother, dated September 27, 2022; (2) copies of three emails sent to the Division's representative in August of 2022; (3) copies of 30 envelopes bearing various names of addressees and addresses (some names redacted); and (4) an article from Forbes magazine, dated August 24, 2022, that discusses the decision by the Internal Revenue Service to forgive late filing penalties for taxpayers who late filed their 2019 and 2020 income tax returns.

13. The statement of Edward J. Benitez claims that petitioner gave him the original request for conciliation conference. Mr. Benitez states that he copied and mailed such request for petitioner on March 20, 2020. No copy of this request was submitted into evidence.

14. With respect to the other documents submitted into evidence, none has a bearing on the issue of petitioner's assertion that he timely filed his request with BCMS as claimed on March 20, 2020.

CONCLUSIONS OF LAW

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9 (a) or summary determination under 20 NYCRR 3000.9 (b). Since the petition was timely filed, the Division of Tax Appeals has subject matter jurisdiction over the issue of the timely filing of a request for conciliation conference. Therefore, 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 (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for conciliation conference with BCMS “if the time to petition for such 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 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).

D. Where the timeliness of a petition or a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (*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, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. The Division has offered proof sufficient to establish the mailing of the statutory notices on the same date that they were dated, i.e., March 13, 2020, to petitioner'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 sheets and on the CMR conforms with the address listed on petitioner's New York income tax return for the year 2011, which satisfied the “last known address” requirement in Tax Law § 681 (a).

F. It is concluded that the notices were properly mailed to petitioner on March 13, 2020 and the statutory 90-day period 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]). Therefore, petitioner must demonstrate that he filed his request within 90 days.

G. In support of his argument, petitioner relies on the statement of his brother who claims that he both copied and mailed the request, on petitioner's behalf, on March 20, 2020. However, there is no evidence of such request. The request attached to his petition was dated September 11, 2020. This date falls well after the 90-day period of limitations for the filing of such a request and was properly dismissed by the October 2, 2020 conciliation orders issued by BCMS.

H. The Division of Taxation's motion for summary determination is granted, the petition of Thomas Armando Benitez is denied, and the conciliation orders dismissing request, dated October 2, 2020, are sustained.

DATED: Albany, New York
December 22, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE