

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CONNOR BURKE	:	DETERMINATION
	:	DTA NO. 830443
	:	
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2013.	:	

Petitioner, Connor Burke, 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 year 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion dated September 6, 2022, seeking an order of dismissal or, in the alternative, summary determination, in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) (1) (i); (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the motion. The 90-day period for issuance of this determination commenced on October 6, 2022. 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 a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Connor Burke, in protest of a notice of deficiency, dated August 3, 2020, and bearing assessment ID number L-051530000 (notice). The notice asserted tax due in the amount of \$4,164.00 plus interest and penalty for the year 2013. The notice is addressed to "BURKE-CONNOR" at an address in Cutchogue, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9735 0054 0378.

On page 2 of the notice, under the heading "**If you disagree,**" it states:

"You have the right to formally protest this notice. If you do formally protest, you are not required to pay the proposed amount due. However, paying now will stop the accrual of additional interest and any additional penalties if you are eventually found liable.

If you do not file your formal protest by **November 1, 2020**, the proposed amount due will become assessed and subject to collection actions. If you filed an informal protest of this matter, you must still file your formal protest by this date to preserve your rights.

You can formally protest this notice in either of the following ways:

1. Conciliation conference

A conciliation conference allows you to challenge this notice in a meeting with an impartial employee of the Tax Department's Bureau of Conciliation and Mediation Services.

The easiest and fastest way to request a conciliation conference is through our website at www.tax.ny.gov. You will need to have an Online Services account. You can create an account if you do not already have one.

If you wish to file on paper, you must file a Form CMS-1-MN, *Request for Conciliation Conference* (available on our website).

2. Division of Tax Appeals hearing

The Division of Tax Appeals is an impartial and independent body that reviews challenges to Tax Department actions. A hearing before the division is more formal than a conciliation conference. To request a hearing, file Form TA-100, *Petition* (available on the division's website at www.dta.ny.gov)."

2. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner and was dated January 29, 2021. The request was faxed to and received by BCMS on March 30, 2021.

3. On April 9, 2021, BCMS issued a conciliation order dismissing request (conciliation order) (CMS No. 000328585) to petitioner. The conciliation order determined that petitioner's protest of the subject 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 August 3, 2020, but the request was not faxed until March 30, 2021, 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 May 10, 2021.¹ In his petition, petitioner asserts that the Division erred in dismissing his request for a conciliation conference as untimely. Petitioner claims that upon receiving the notice asserting tax, interest and penalties due for the year 2013, he contacted the preparer of his 2013 tax returns, a since retired certified public accountant (CPA), "who directed Petitioner to his successor to locate the required documentation." He further claims that he had to determine "where his own copies of the 2013 tax returns were stored." Petitioner maintains that he sent a letter to the Division's Audit Division-Income/Franchise Desk-AG15 on or about August 10, 2020, indicating that despite the COVID-19 pandemic, he was: "(1) endeavoring to

¹ The envelope in which the petition was sent to the Division of Tax Appeals bears a United States Postal Service (USPS) certified mail sticker; however, there is no USPS postage paid stamp on same. A Division of Tax Appeals stamped received date of May 10, 2021 appears on the envelope.

gather all documents and information needed regarding his 2013 tax returns; and (2) retaining another CPA, who advised him to seek additional time from [the Division] to gather this information and determine the best course of action.” He further maintains that in the letter, he “requested an extension of time until February 10, 2021 to elect to proceed to a conciliation conference or proceed in an alternate fashion, and for [the Division] to hold garnishment or collection in abeyance until that time.” Petitioner avers that the Division’s letter, dated September 21, 2020, acknowledging receipt of his letter and confirming that no collection or enforcement action would be initiated within the requested timeframe, indicated to him “that his request for an extension of time was granted in its entirety.” He further avers that the Division’s “letter did not indicate otherwise.” Petitioner asserts that in response to the Division’s January 15, 2021 “Response to Taxpayer Inquiry” letter, he filed his request for conciliation conference by fax on January 29, 2021. He further asserts that because he had not received any scheduling order for a conciliation conference “after his January 2021 facsimile,” he contacted the Division “again by facsimile on March 30, 2021, to inquire as to the status of his request” for a conciliation conference. Petitioner argues that “[e]quity and the extenuating circumstances of the COVID-19 pandemic, coupled with [his] timely request for an extension of time, and [the Division’s] prejudicial conduct, warrants reconsideration of [the Division’s] denial of [his] request for a conciliation conference.”

5. Among the attachments to the petition were the following:

(a) An undated letter sent to the Division’s Audit Division-Income/Franchise Desk-AG15 on or about August 10, 2020, in which petitioner requested “any collection or garnishment attempts by your Department be held in abeyance . . . until February 10, 2022” to allow his retained certified public accountant sufficient time to “investigate the alleged tax amount,

interest and penalty” claimed to be owed for the year 2013. In addition, petitioner’s letter indicated that “[o]n or before February 10, 2021, I shall notify your Department as to whether I elect to proceed to a conciliation conference or resolve this matter in another way.”

(b) A “Correspondence Acknowledgement Notice,” dated September 21, 2020, issued by the Division’s Collection and Enforcement Division – Central Office, regarding assessment “ID L-051530000-7” and protest “ID K-210001010-2,” that stated, in part, as follows:

“[w]e have received correspondence from you or your representative regarding the assessment(s) identified above.

Please be aware of the following:

- No further collection or enforcement action will be taken on any assessment listed until the protest has been resolved.
- Where applicable, statutory interest and penalty will continue to accrue until any assessment is paid in full or canceled.
- If final resolution includes the reduction or elimination of tax, penalty and/or interest, your account will be adjusted accordingly.
- You will be notified of the resolution. No further correspondence is necessary unless you are submitting additional information or responding to an inquiry from this department.”

(c) A “Response to Taxpayer Inquiry” letter, dated January 15, 2021, issued by the Division’s Audit Division-Income/Franchise Desk-AG15, regarding “PROTEST ID: K-210001010-2” and “ASSESSMENT ID: L-051530000-7,” that stated, in relevant part, as follows:

“We have received your reply regarding the above assessment(s).

On 08/03/2020, you were issued a Notice of Deficiency L-051530000-7, for tax year 2013. Any further review of this matter requires that you file a Form CMS-1-MN, Request for Conciliation Conference, with the Bureau of Conciliation and Mediation Services or a TA-100, Petition, for a Tax Appeals Hearing with the Division of Tax Appeals within ninety days from the date of the Notice of Deficiency.

We have received your correspondence requesting an extension to file your 2013 New York State tax return or to request a Conciliation Conference until February 10, 2021. We cannot stop collections on an open assessment. Please contact the Civil Enforcement Division at 518-457-5434 to discuss your options.”

(d) Two one-page documents related to petitioner’s claim that he faxed a request for a conciliation conference to BCMS on January 29, 2021, consisting of a “FAX” coversheet from petitioner “TO: NYS Dept of Taxation & Finance 518-435-8554 (fax),” dated “1-29-21,” listing “CONTENTS: Request for Conciliation Conference re: Protest ID K-210001010-2; Assessment ID L-051530000-7;” and a “HP LaserJet Professional M1212nf MFP Fax Activity Log” listing jobs 146 through 185 dated from 10/18/2020 through 03/31/2021 and an “Identification” fax number to which each job was sent.

6. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated September 6, 2022, of Christopher O’Brien, Esq., the Division’s representative; (ii) an affidavit, dated August 23, 2022, of Marianna Denier, a Principal Administrative Analyst and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “CERTIFIED RECORD FOR – DTF-962-F-E - Not of Def Follow Up DTF-963-F-E - Not of Det Follow up” (CMR) postmarked August 3, 2020; (iv) an affidavit, dated August 26, 2022, of Susan Ramundo, a manager in the Division’s mail room; (v) a copy of the notice with the associated mailing cover sheet; (vi) a copy of petitioner’s request for conciliation conference; and (vii) a copy of petitioner’s and his spouse’s New York State resident income tax return (form IT-201) for the year 2019, electronically filed on July 14, 2020, which lists the same Cutchogue, New York, address for petitioner as that listed on the notice, the request for conciliation conference, and the petition, except that petitioner’s address on the notice includes an additional four zip code digits to petitioner’s five-digit zip code. The

2019 personal income tax return was the last return filed with the Division by petitioner and his spouse before the notice was issued.

7. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier has been the Director of MAPS since July 2022 and a Principal Administrative Analyst since August 2022. She was a Supervisor of Administrative Analysis from July 2019 through August 2022. Ms. Denier began working for the Division in February 1986 and has been a supervisor in MAPS since October 2004. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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 "20202100635." 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 "8-3." In addition, as described by Ms. Denier, 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.

8. 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."

9. The CMR in the present matter consists of 324 pages and lists 4,352 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 10 to 15 such entries with the exception of page 324 which contains 10 entries. Ms. Denier 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 August 3, 2020 to each page of the CMR, wrote the number "4352" on page 324 next to the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed the last page of the CMR.

10. Page 239 of the CMR indicates that a notice with certified control number 7104 1002 9735 0054 0378, and reference number L-051530000 was mailed to petitioner "BURKE-CONNOR" at the Cutchogue, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit "B," bears this certified control number and petitioner's name and address as noted.

11. The affidavit of Susan Ramundo, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, 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. 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 mail room further requests that the USPS either circle the total pieces received or indicate the total number of pieces received by writing the number on the CMR. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division’s record of receipt by the USPS for the pieces of certified mail listed thereon.

12. Each of the 324 pages of the CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark of August 3, 2020. On page 324, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 4,352 and next to “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten entry “4352,” indicating 4,352 pieces of mail were received by the USPS. There is a set of initials on page 324.

13. According to both the Denier and Ramundo affidavits, a copy of the notice was properly mailed to petitioner on August 3, 2020, as claimed.

14. 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) (i) and (vii) 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 was filed within 90 days of the conciliation order, 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 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, 573 [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, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] *appeal dismissed* 62 NY2d 942 [1984]).

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 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 a 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 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 Lucheonette*, 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 (*Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where, as here, the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal,

November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show 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).

G. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on August 3, 2020. 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 CMR conform with the address listed on petitioner's and his spouse's 2019 personal income tax return which satisfies the "last known address" requirement.²

H. It is concluded that the Division properly mailed the notice on August 3, 2020, 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]; 681 [b]; 689 [b]). Petitioner's request for conciliation conference was filed on March 30, 2021. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the April 9, 2021 conciliation order issued by BCMS.

² While it is noted that the Division added four additional zip code digits to petitioner's zip code as reflected on petitioner's and his spouse's 2019 personal income tax return filed with the Division, such difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Moreover, petitioner does not contend that the notice was improperly addressed, nor dispute receipt of the notice, and he did not respond to the motion. As such, it is deemed admitted that the address on the notice was petitioner's last known address.

I. Although petitioner did not respond to the Division's motion, he raised arguments in his petition regarding equity, the extenuating circumstances of the COVID-19 pandemic, his request for an extension of time in which to file a request for conciliation conference, and the Division's alleged prejudicial conduct in response to such extension request. Petitioner's arguments are unavailing. It is firmly established that the deadlines for filing requests or petitions are strictly enforced (*see e.g. Matter of Lamanna*, Tax Appeals Tribunal, March 13, 2003; *Matter of Standard Notions*, Tax Appeals Tribunal, February 23, 2006). Furthermore, the Division of Tax Appeals has no authority to waive the filing period in particular cases (*see Matter of Lukacs*).

J. The Division of Taxation's motion for summary determination is hereby granted, the petition of Connor Burke is denied and the April 9, 2021 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
December 29, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE