

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LINDA DELL : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 830805
New York State Personal Income Tax under Article 22 of :
the Tax Law for the Year 2018. :

Petitioner, Linda Dell, 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 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion, filed on April 19, 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 by Mathew P. Wattoff, CPA, did not respond to the motion by May 23, 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 a notice of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion on April 19, 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 a notice of deficiency, dated December 23, 2020, and bearing assessment identification number L-051872945 (notice). The notice is addressed to petitioner, Linda Dell, at an address in Hopewell Junction, New York.

2. On October 13, 2021, petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On November 5, 2021, 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 12/23/2020, but the request was not faxed until 10/13/2021, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals, on December 17, 2021, in protest of the conciliation order.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affirmation of Maria Matos, Esq., sworn to on April 19, 2022, the following with its motion papers: (i) an affidavit, dated April 12, 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-F-E-Not of Def Follow Up” (CMR) postmarked December 23, 2020; (iii) an affidavit, dated April 14, 2022, of Susan Ramundo, a manager in the Division's mailroom; (iv) a copy of the notice mailed

to petitioner with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference that reflects petitioner's Hopewell Junction, New York, address; and (vi) a copy of petitioner's New York resident income tax return, form IT-201, for the tax year 2019, dated February 7, 2020, that reflects petitioner's Hopewell Junction, New York, address.

Petitioner's 2019 form IT-201 was the last return filed before issuance of the notice.

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 "20203520635." 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 "12-23." 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 104 pages and lists 1,381 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 December 23, 2020, to each page of the CMR, wrote the number "1381" on page 104 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 104.

9. Page 76 of the CMR indicates that a notice with certified control number 7104 1002 9735 0367 9501 and reference number L 051872945 was mailed to petitioner at the Hopewell Junction, 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 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 December 23, 2020. On page 104, corresponding to "Total Pieces and Amounts," is the preprinted number 1,381 and next to "Total Pieces Received At Post Office" is the handwritten entry "1381." There is a set of initials or a signature on page 104.

11. According to the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on December 23, 2020, as claimed.

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 a 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 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 Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

D. Where the timeliness of a petition or a request for a 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 notice on the same date that it was dated, i.e., December 23, 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 sheet and on the CMR conforms with the address listed on petitioner's New York State income tax return for the year 2019, which satisfied the "last known address" requirement in Tax Law § 681 (a).

F. Petitioner did not respond to the Division's motion. Therefore, petitioner 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 Assoc. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). As petitioner presented no evidence to contest the facts alleged in the affidavits supporting the Division's motion, those facts are likewise properly deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*, 182 AD2d 446 [1st Dept 1992]).

G. It is concluded that the notice was properly mailed to petitioner on December 23, 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]). Petitioner's request for conciliation conference was not filed until October 13, 2021. This date falls well after the 90-day period of limitations for the filing of such a request and was properly dismissed by the November 5, 2021 conciliation order issued by BCMS.

H. The Division of Taxation's motion for summary determination is granted, the petition of Linda Dell is denied, and the conciliation order dismissing request, dated November 5, 2021, is sustained.

DATED: Albany, New York
August 18, 2022

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE