

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROHANJIT AND NIMRATA SINGH : ORDER
for Redetermination of Deficiencies or for Refund of : DTA NO. 825687
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for :
the Years 2009, 2010 and 2011. :
:

Petitioners, Rohanjit and Nimrata Singh, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2009, 2010 and 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion filed November 19, 2013, seeking an order of dismissal or, in the alternative, summary determination in the above-referenced matter pursuant to Tax Law § 2006.6 and sections 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.¹ Accompanying the motion was the affidavit of Michele W. Milavec, Esq., dated November 19, 2013, and annexed exhibits. On December 19, 2013, petitioners, by their representative, Julie I. Vaiman, Esq., submitted the affirmation of Mayya S. Gotlib, Esq., and additional documents in opposition to the motion, which date commenced the 90-day period for issuance of this order. After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ The Division of Taxation's motion pertains to the years 2009 and 2010 only. The Division of Taxation agrees that the petition was timely filed with respect to the year 2011.

ISSUE

Whether petitioners 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 subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of two notices of deficiency dated December 24, 2012 and addressed to petitioners, Rohanjit and Nimrata Singh, at a New York, New York, address. The first Notice of Deficiency, notice number L-038803526, asserted additional New York State personal income tax for the year 2009 in the amount of \$92,759.58, plus interest and penalty, for a balance due of \$128,537.74. The second Notice of Deficiency, notice number L-038803527, asserted additional New York State personal income tax due for the year 2010 in the amount of \$94,244.73, plus interest and penalty, for a balance due of \$117,997.21.

2. Petitioner protested the two notices of deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a Request for Conciliation Conference, dated March 25, 2013. The request was mailed to BCMS by United States Postal Service (USPS) Certified Mail on March 26, 2013. BCMS received the request on March 29, 2013. The request lists petitioners' address as the New York, New York, address.

3. On April 12, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioners. The order determined that petitioners' protest of the subject notices of deficiency was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 24, 2012, but the request was not mailed until March 26, 2013, or in excess of 90 days the request is late filed.

4. In response to the dismissal order, petitioners filed a petition with the Division of Tax Appeals. The petition lists petitioners' address as the same New York, New York, address. The Division subsequently brought this motion, dated November 19, 2013, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioners' protest of the statutory notices was filed more than 90 days from their date of issuance.

5. In support of its motion for summary determination, the Division submitted, among other things, the following: (i) an affidavit, dated November 15, 2013, of Bruce Peltier a Principal Mail and Supply Supervisor in the Division's Mail Processing Center; (ii) an affidavit, dated November 15, 2013, of Daniel B. Maney, a Taxpayer Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR); (iv) an affidavit, dated November 15, 2013, of Heidi Corina, a Legal Assistant 2 in the Division's office of counsel; (v) a copy of petitioners' Request for Conciliation Conference and the Conciliation Order in response thereto; and (vi) a copy of petitioners' joint New York State personal income tax return (form IT-201) for the year 2011 dated November 13, 2012, which was the last filing from petitioners prior to the issuance of the notices of deficiency.

6. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices prior to shipment to the mail processing center.

7. Attached to the Maney affidavit, as exhibit "A," is the 29-page CMR issued by the Division on December 24, 2012. Pages 1 and 29 have a handwritten entry referring to December 24, 2012 on the top; however, none of the other pages have a similar entry.

8. Page four of the CMR indicates that two notices of deficiency with certified control

numbers 7104 1002 9730 1435 3372 and 7104 1002 9730 1435 3389 and assessment ID numbers L-038803526 and L-038803527 were mailed to “Singh-Rohanjit” at the New York, New York, address listed on the subject notices of deficiency.² The corresponding mailing cover sheets bear these certified control numbers and the names, “Singh-Rohanjit” and “Singh-Nimrata,” and the New York, New York, address.

9. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999 and currently a Principal Mail and Supply Supervisor in the Division’s Mail Processing Center (Center), describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Each notice is preceded by a mailing cover sheet. A CMR is also received by the Center for each batch of notices. 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. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A mail processing clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center 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 Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by

² The certified mail record lists only the name Rohanjit Singh because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the husband’s social security number is listed in the place designated for the primary taxpayer, only the husband’s name will appear on the certified mail record.

writing the number on the last page of the CMR. In the ordinary course of business, a Center employee picks up the CMR from the USPS on the following day and returns it to the CARTS Control Unit.

10. Pages 1 through 28 of the CMR contain a USPS postmark of December 24, 2012.³ The last page of the CMR, page 29, contains a preprinted entry of “318” corresponding to the heading “Total Pieces and Amounts.” The number “318” is not circled nor is the number “318” handwritten on the last page of the CMR. Page 29 also does not contain the initials or signature of a US postal employee or a USPS postmark.

11. According to both the Maney and Peltier affidavits, copies of the subject notices were mailed to petitioners on December 24, 2012, as claimed.

12. Petitioners’ 2011 New York resident income tax return, dated November 13, 2012, reported petitioners’ address as New York, New York 10023. This was the last return filed by petitioners prior to the issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioners.

13. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for the two items mailed by the Division under certified numbers 7104 1002 9730 1435 3372 and 7104 1002 9730 1435 3389 on December 24, 2012

³ The postmark is barely legible on some of the pages.

from the Colonie Center branch office of the USPS to petitioners at their New York, New York, address listed above. In response, the USPS confirmed delivery of each of these certified mail items at the noted address, specifically to petitioners' address, on December 26, 2012 at 12:59 P.M.

14. In opposition to the Division's motion, petitioners submitted the affidavit of petitioner Rohanjit Singh. In his affidavit, Mr. Singh contends that in response to the notices of deficiency for the years 2009 and 2010, on February 27, 2013, petitioners' accountant, John Cisneros, submitted voluminous documents to Gregory Gero, of the Department of Taxation and Finance in Albany, supporting petitioners' dispute of the notices. Mr. Singh further contends that as a result of this submission, petitioners received responses to a taxpayer inquiry, dated March 19, 2013, confirming receipt of their documents and stating that the additional documents did not change the prior assessments. He asserts that after receiving the responses to taxpayer inquiry, petitioners' accountant filed a request for conciliation conference, dated March 25, 2013. Mr. Singh further asserts that the request for conciliation conference was timely mailed on March 25, 2013.

CONCLUSIONS OF LAW

A. 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 and that 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, 487 NYS2d 316, 317-318 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Inasmuch 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, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879, 881 [1960]).

C. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see* Tax Law § 170[3-a][a],[b]). The filing of a petition or a request for a conciliation conference within the 90-day period is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

D. Where the timeliness of a petition or a request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioners’ last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-

fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices 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 (*see id*).

E. The affidavits of two Division employees, Daniel A. Maney and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of notices of deficiency by certified mail. The affidavits generally describe the various stages of producing and mailing notices of deficiency. However, on the last page of the CMR, the number of pieces received has not been circled nor has the number of pieces indicated as received been handwritten by a USPS employee. The last page also does not contain the initials or signature of a USPS employee. The presence of a USPS postmark on page 4 of the CMR is insufficient to show that the items of mail listed on that page were actually delivered to the USPS. Prior cases of the Tax Appeals Tribunal establish that the presence of a USPS postmark on a selected page of a longer certified mail record is not sufficient to prove that an item listed on that page was delivered to the USPS on the postmark date. In *Matter of Roland* (Tax Appeals Tribunal, February 22, 1996), a USPS postmark appeared on each page of the certified mail record, including the page bearing the subject taxpayer's name and address; nonetheless, the Division's proof was found inadequate to prove that the item of mail addressed to the taxpayer was actually delivered to the USPS. Delivery of a particular item listed in the certified mail record is proven when an employee of the USPS acknowledges receipt of the items listed by circling the total number of pieces received or writing the total number of pieces received as requested by the Mail Processing Center. A USPS date stamp alone placed on one or more pages of the certified mail record is not sufficient (*Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998, *see also Matter of Roland; Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of*

Fuchs, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995).

Therefore, it is concluded that the Division has not met its burden of establishing proper mailing of the subject notices of deficiency.

F. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). The affidavit of Heidi Corina, the request for delivery information/return receipt after mailing forms (USPS forms 3811-A) and the responses of the USPS indicate that the notices of deficiency were received by petitioners on December 26, 2012. Therefore, running the statute of limitations from the date of receipt of the notices, the 90-day period ends on March 26, 2013.

G. The request for conciliation conference was mailed on March 26, 2013. The 90-day period to file the request expired on March 26, 2013. Accordingly, it is found that the request was timely filed.

H. The Division of Taxation's motion for summary determination is denied. The matter will be scheduled for a hearing as soon as is practicable.

DATED: Albany, New York
March 13, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE