

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SCOTT CONNORS : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 826326
New York State Personal Income Tax under Article 22 :
of the Tax Law and the Administrative Code of the City :
of New York for the Year 2011. :
:

Petitioner, Scott Connors, 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 and the Administrative Code of the City of New York for the year 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion on March 9, 2015, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Christopher O'Brien, Esq., dated March 9, 2015, and annexed exhibits. Petitioner filed a timely response to the Division of Taxation's motion. The 90-day period for the issuance of this order began on April 9, 2015, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Scott Connors, at his Honeoye, New York, address, a Notice of Deficiency, dated December 5, 2013, which assessed personal income tax in the amount of \$1,483.00 for tax year 2011, plus penalty and interest. By its Request for Conciliation Conference, postmarked April 7, 2014, and received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on April 9, 2014, petitioner protested the notice, numbered L-040223148-7.

2. BCMS issued a Conciliation Order Dismissing Request dated April 25, 2014, to petitioner (CMS No. 261548). The 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 mailing date of the statutory notice. Since the notice(s) was issued on December 5, 2013, but the request was not mailed until April 7, 2014, or in excess of 90 days, the request is late filed.

3. The petition filed herein indicates that it was received by the Division of Tax Appeals on June 23, 2014, within 90 days after the issuance of the conciliation order.

4. To show proof of proper mailing of the notice dated December 5, 2013, the Division provided the following: (i) an affidavit, dated February 19, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division, who is familiar with the Case and Resource Tracking System (CARTS) and procedures for generating statutory notices; (ii) an affidavit, dated February 20, 2015, of

Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 5, 2013; and (iv) and a copy of petitioner's Resident Income Tax Return, Form IT-201, for the tax year 2012, which was signed by petitioner and dated February 3, 2013.

5. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing and mailing statutory notices, and included the identification of a statutory notice having been mailed on December 5, 2013, to petitioner at his Honeoye, New York address.

6. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's mail processing unit, describes the unit's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Once prepared, a staff member 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 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. All of the pages of the CMR bear a postmark of December 5, 2013, from the Colonie Center NY post office. On page 98, the last page, corresponding to "Total Pieces and Amounts," is the preprinted and circled number 1069, representing all the notices placed into the hands of the postal employee, along with the dated postmark. There are also initials, though not legible, which are presumably the initials of the postal employee handling this mailing.

7. According to the Nagengast affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that all 1069 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on December 5, 2013.

8. According to both the Nagengast and Peltier affidavits, a copy of the subject notice was mailed to petitioner on December 5, 2013, as claimed.

9. Petitioner's Honeoye, New York, address on the CMR and Mailing Cover Sheet matches the address listed on its Resident Income Tax Return (Form IT-201) for the for the tax year 2011. Bearing a date of February 3, 2013, this is the last return that petitioner filed with the Division before the issuance of the subject Notice of Deficiency.

10. Petitioner's response to the motion included the following facts:

a.) On or around February 20, 2013, petitioner received a letter from the Division concerning an audit of petitioner's 2011 tax return concerning medical expenses on petitioner's tax return. Petitioner immediately responded to the Division with a copy of his federal schedule A showing no medical deduction.

b.) At the end of February 2013, petitioner received another letter concerning unreimbursed employee business expenses. Petitioner responded to the Division on April 14, 2013, to inform the auditor that he was working on obtaining certain parts of the information requested.

c.) On June 6, 2013, petitioner sent a package of 250-300 pages of receipts for items requested by the Division.

d.) Petitioner then received the statement of proposed audit changes dated October 16, 2013, wherein many deductions were disallowed. Petitioner followed up the with the auditor

after expressing his disagreement in writing to the auditor's findings. The auditor requested additional information and this was provided to the auditor on December 5, 2013.

e.) Petitioner received a "response to taxpayer inquiry" letter from the Division dated December 17, 2013, and petitioner again reached out to the auditor to inquire what additional information might satisfy his questions. Petitioner indicated that there was never mention of a conciliation conference. The Division's letter of December 17, 2013, specifically refers to assessment ID L-040223148-7, and states the following, in pertinent part: "The New York State Department of Taxation and Finance (department) has received documentation in protest to the above referenced assessment."

f.) Having acquired additional substantiation, petitioner sent the materials to the Division on December 29, 2013. At that time, petitioner was under the impression the matter was settled.

g.) Petitioner received a demand for payment dated March 24, 2014, and thereafter filed the request for conference.

CONCLUSIONS OF LAW

A. The Division of Taxation has made a motion to dismiss, or alternatively, a motion for summary determination, as to the issue of the timeliness of petitioner's request for a conciliation conference. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][1][ii]). As the petition in this matter 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 20 NYCRR 3000.9(b) 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 may 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 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]). 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 Civil Practice Law and Rules § 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 [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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

C. Tax Law § 681 authorizes the Division of Taxation to issue a Notice of Deficiency for additional tax or penalties due under Article 22. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of deficiency (*see* Tax Law §§ 681, 170 [3-a] [b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). 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 substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a petitioner's protest 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).

E. Here, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The facts concerning the CMR indicate that the proper mailing procedures were followed in this case. Accordingly, the Division has presented sufficient documentary proof to establish that the subject Notice of Deficiency was mailed as addressed to petitioner on the date claimed.

F. Petitioner set forth the sequence of his contact with the Division's auditor from February 2013, until a demand for payment was made in late March 2014. Petitioner then filed a request for conciliation conference on April 7, 2014, albeit late as measured from the notice. However, petitioner responded promptly and appropriately for over a year while the documentation was being reviewed, and most importantly, the Division acknowledged in its own letter, after the issuance of the notice of deficiency, that it had received documentation in protest of the assessment in issue. Analogous to an informal claim for refund, the Tax Appeals Tribunal has applied the general principles that govern an informal claim for refund to the matter of whether a request for a conciliation conference under Tax law § 170 (3-a) (a) was timely filed (*see Matter of Crispo*, Tax Appeals Tribunal, April 13, 1995). Likewise, the Tribunal has also applied the same principles to be applicable in determining whether a taxpayer has timely filed a petition with the Division of Tax Appeals (*see Matter of Lehal Realty Associates*, Tax Appeals Tribunal, May 18, 1995).

The issue of whether a timely protest has been filed requires that this matter be viewed in conjunction with a body of federal case law that generally holds that there are circumstances under which a taxpayer's informal claim for refund may be sufficient to meet the jurisdictional prerequisite for a timely-filed claim for refund. The leading case on this topic is *United States v. Kales* (314 US 186 [1941]). In *Kales*, the taxpayer, prior to the deadline for filing a formal refund claim, wrote a letter to the Commissioner advising him that if the Internal Revenue Service revised the valuation of certain stock she would insist on a higher valuation and would claim the right to a refund. The letter did not comply with the IRS's regulations because it was not filed on the correct form. The taxpayer subsequently filed an untimely amended return that

complied with the regulations for a formal claim for refund. The Court held that the letter to the Commissioner constituted a valid, although informal, claim for refund. The Court stated:

a notice fairly advising the Commissioner of the nature of the taxpayer's claims, which the Commissioner could reject because too general or because it does not comply with the formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period (citations omitted) (*id.* at 194).

A second frequently cited case holding that an informal claim for refund may, under some circumstances, stop the running of the statute of limitations on refund claims is *American Radiator & Standard Sanitary Corp. v. United States* (318 F2d 915 [1963]). On the subject of informal claims, the *American Radiator* Court stated:

Informal refund claims have long been held valid [citing *Kales* and cases cited therein]. But they must have a written component, and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years. . . . In addition to the writing and some form of request for a refund, the only essential is that there be made available sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim (*id.* at 920; citations omitted).

The United States Court of Federal Claims, in a more recent case, *New England Electric System v. United States* (32 Fed Cl 636 [1995]), more succinctly sets forth the three components to an informal claim, acknowledging the longstanding principles of *Kales* and *American Radiator*, as follows:

First, an informal claim must provide the Commissioner of the IRS with notice that the taxpayer is asserting a right to a refund. Second, the claim must describe the legal and factual basis for the refund. Finally, an informal claim must have some written component (*American Radiator, supra* at 113-114). An informal claim, however, requires a court to go beyond the written component and examine the facts and circumstances which are presented in every case (*id.* at 641 [citation omitted]).

The court concluded that although in a perfect world the informal claim would contain all the elements, it will not necessarily fail to be valid in their absence, since the written component alone need not provide the entire framework for the informal refund claim (citing *American Radiator*, at 114). Instead, the elements of the informal claim may be provided through oral communications and other writings (*see New England Electric System* at 644).

G. The Tax Appeals Tribunal has recognized that the same principles may apply to a case where an informal protest is made, so long as there is a written component that adequately apprises the taxing authority that a particular assessment is under protest, along with the tax year in question. It must contain enough information to enable the taxing authority to begin an investigation of the matter if it so chooses, and be filed within the statutory period for filing such a claim (*Matter of Battaglia*, April 18, 2002; *Matter of Rand*, May 10, 1990). In this case, petitioner provided written documentation concerning an assessment that the Division acknowledged was a protest of the same assessment. The last of the documentation submitted by petitioner was on December 29, 2013, and acknowledged by the Division in its correspondence dated December 17, 2013. Petitioner's informal protest was clearly stated and identified, as well as timely, and the request for conciliation conference perfected what may have otherwise been an untimely request. Accordingly, petitioner's protest, i.e., his request for a conciliation conference is deemed timely.

H. The Division's motion for summary determination is denied and a hearing on the merits of the petition will be scheduled in due course.

DATED: Albany, New York
July 2, 2015

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE