

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HOWARD F. AND LYNN M. HOF SOMMER : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 827425
Personal Income Tax under Article 22 of the Tax Law for :
the Year 2010. :

Petitioners, Howard F. and Lynn M. Hofsommer, 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 2010.

On December 7, 2017, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), brought a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (ii) and 3000.9 (b). Accompanying the motion was the affidavit of Stephanie M. Lane, Esq., and attached exhibits in support of the motion. Petitioners, appearing by Melvin & Melvin, PLLC (Richard M. Storto, Esq., of counsel) submitted the affidavit of Richard M. Storto, Esq., dated January 3, 2018, and the affidavit of Howard M. Hofsommer, dated January 3, 2018, and attached exhibits, in opposition of the Division of Taxation's motion on January 4, 2018. The 90-day period for issuance of this order commenced on January 8, 2018 (20 NYCRR 3000.5 [d]). After due consideration of the motion papers, attached affidavit and annexed exhibits, the affidavits and documents submitted in opposition to the motion, and all

pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely protest 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 petitioners' protest of a notice of deficiency, dated January 28, 2015, and addressed to petitioners, Howard F. Hofsommer and Lynn M. Hofsommer, at "45169 Deepwood Ct, Shelby Twp, MI 48317-4981." The notice of deficiency, notice number L-042278986, asserted additional New York State personal income tax due for the year 2009 in the amount of \$8,540.00, plus interest and penalty, for a balance due of \$15,311.76. The mailing cover sheet of the notice of deficiency contains the certified control number 7104 1002 9730 0366 9941.

2. Petitioners protested the notice of deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) a request for conciliation conference (Request). The Request was signed and dated by Frederick J. Popp, CPA, as petitioners' representative, on November 9, 2015. The envelope in which the Request was mailed bears a metered stamp dated November 17, 2015. The Request listed petitioners' address as 3183 Lords Hill Road, Nedrow, New York 13120. BCMS received the Request on November 19, 2015.

3. On December 4, 2015, BCMS issued a conciliation order dismissing request (Conciliation Order) to petitioners. 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 was issued on January 28, 2015, but the

request was not received until November 19, 2015, or in excess of 90 days, the request is late filed.”

4. On January 15, 2016, the Division of Tax Appeals received a petition seeking redetermination of the notice of deficiency. The envelope in which the petition was sent by Certified Mail bears a United States Postal Service (USPS) metered stamp dated January 14, 2016. There is no dispute that the petition was filed within 90 days after the December 4, 2015 issuance of the Order and constitutes a timely challenge thereto. Petitioners’ petition lists their address as a Nedrow, New York address. In their petition, petitioners asserted that they never received the notice of deficiency. They further asserted that a notice entitled “Response to Taxpayer Inquiry,” dated August 24, 2015, was the first notice they received regarding an income tax liability for the year 2010. Petitioners claim that their Request was timely and a conciliation conference should be allowed. They also claim that they have a meritorious case regarding the underlying assessment.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affidavit of Stephanie Lane, Esq., the Division’s representative, dated December 6, 2017; (ii) an affidavit, dated March 31, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated January 28, 2015; (iv) an affidavit, dated March 31, 2016, of Bruce Peltier, a supervisor in the Division’s mail room; (v) a copy of the January 28, 2015 notice and the associated mailing cover sheet; (vi) copies of petitioners’ Request received by BCMS on November 19, 2015 and the envelope in which it was mailed; (vii) a copy of petitioners’ 2009 New York Nonresident and Part-Year Resident income tax return, stamped as

received by the Division's Audit Support & Control Section on September 22, 2014; (viii) a copy of petitioners' 2009 Michigan Individual Income Tax Return; (ix) a copy of the first page of a Statement of Proposed Audit Changes, dated August 21, 2014;¹ and (x) a copy of a cover letter dated September 8, 2014 from petitioners' accountant.

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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. In addition, as described by Ms. Nagengast, 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. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet is the first sheet in the

¹ The first page of the Statement of Proposed Audit Changes also bears the Division's Audit Support & Control Section received stamp dated September 22, 2014.

unit.

8. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control number is also listed on the CMR under the heading entitled "Certified No." 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." Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together.

9. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

10. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently a mail and supply supervisor, describes the Division's mail room's general operations and procedures. The mail room receives the statutory notices in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by a mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. 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. That staff member then weighs, seals

and places postage and fee amounts 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 30 or fewer pieces listed on the CMR by checking those envelopes against the information listed on the CMR. A member of the mail room staff 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 number of pieces received or indicate the total number of pieces received by writing the number on the CMR. The CMR is the Division's record of receipt, by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

11. The CMR relevant to the notice of deficiency under protest consists of 1,368 pages and lists 15,043 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20150211700." Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date "1/28/15," reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Pages 1 through 909 of the CMR bear an erroneous USPS postmark dated January 28, 2014, and a corrected USPS postmark dated January 28, 2015. The remaining pages, i.e., pages 910 through 1,368, include a USPS postmark dated January 28, 2015. All

pages of the CMR include 11 such entries, with the exception of page 1,368, on which 6 entries appear. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

12. Page 1,332 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0366 9941 and reference number L-042278986 was issued to “HOFSSOMMER-HOWARD F” at the 45169 Deepwood Court, Shelby Township, Michigan, address listed thereon.² The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number, petitioners’ names, “Hofsommer-Howard F,” and “Hofsommer-Lynn M,” and the address as noted above.

13. Appearing on page 1,368 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” to the right of which appear preprinted columns headed “PIECES,” “POSTAGE,” “FEE @ 3.30,” and “RR FEE @ .00.” These columns reflect the preprinted number of pieces of mail for this CMR, here 15,043, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” below and to the right of which appears the initials or signature of the USPS employee above the handwritten number “18,043.” The aforementioned USPS postmark dated January 28, 2015 is to the right of the handwritten number.

14. To establish the address used by the Division in issuing the notice of deficiency was petitioners’ last known address, the affidavit of Stephanie M. Lane references attachment 6,

² The certified mail record lists only the name Howard F. Hofsommer 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.

which Ms. Lane indicates is a copy of petitioners' "Amended New York State Nonresident and Part-Year Resident Personal Income Tax Return, Form IT-203, for the tax year 2009, filed on September 22, 2014" (*see* Lane affidavit at 6). A review of attachment 6 reveals that it includes the following documents:

(a) an unsigned copy of petitioners' 2009 Nonresident and Part-Year Resident Income Tax Return, Form IT-203, that listed a Shelby Township, Michigan address and was stamped received on September 22, 2014 by the "DEPT. OF TAXATION & FINANCE AUDIT SUPPORT & CONTROL SECTION C.O. MAIL UNIT AUDIT DIVISION";

(b) an unsigned copy of petitioners' 2009 MICHIGAN Individual Income Tax Return, Form MI-1040, that listed a Shelby Township, Michigan, address;

(c) a copy of the first page of a Statement of Proposed Audit Changes issued to petitioners at a Nedrow, New York, address by the Division's Audit Division-Income/Franchise Desk-AG-15 on August 21, 2014,³ that was stamped received on September 22, 2014 by the "DEPT. OF TAXATION & FINANCE AUDIT SUPPORT & CONTROL SECTION C.O. MAIL UNIT AUDIT DIVISION";

(d) a copy of the cover letter from petitioners' accountant responding to the enclosed notice and enclosing copies of petitioners' 2009 Form IT-203 and 2009 Form MI-1040; and

(e) a copy of a portion of the envelope in which the documents were transmitted to the Division's "Audit Division-Income."⁴

15. In response to the Division's motion, petitioners submitted the affidavit of their representative, Richard M. Storto, and the affidavit of petitioner Howard M. Hofsommer and

³ The Statement of Proposed Audit Changes bears assessment ID number L-041800367.

⁴ The complete address does not appear on the photocopied portion of the envelope.

annexed exhibits.

16. Mr. Hofsommer, in his affidavit, asserts that during the entirety of 2013, he and his wife were residents of New York State residing at a Nedrow, New York, address, and that their 2013 New York State Resident Income Tax Return, form IT-201, reflecting such Nedrow, New York, address, was electronically filed on or about April 15, 2014. He further asserts that the copy of the 2009 Form IT-203, attached to Ms. Lane's affidavit, was submitted by their accountant in response to the Statement of Proposed Audit Changes issued for year 2013, and was not an original filing of an IT-203 for the year 2009. Mr. Hofsommer also avers that he and his wife did not receive the notice of deficiency dated January 28, 2015. He further avers that the first written notice concerning the 2010 taxes that he and his wife acknowledge receiving was a Response to Taxpayer Inquiry, dated August 24, 2015, issued by the Division's Audit Division-Income/Franchise Desk-AG6.

17. One of the documents attached to Mr. Hofsommer's affidavit is a copy of the New York State Resident Income Tax Return, Form IT-201, for the year 2013, electronically filed by petitioners, on which their address is listed as Nedrow, New York.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), 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 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” (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 Village of Patchogue Fire Dept.*, 146 AD2d 572 [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. 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 (Tax Law § 681 [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). 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).

E. Where, as here, the Division claims that a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). When a notice is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner, in turn, bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Malpica*; *see also Matter of Ruggerite, Inc. v State Tax Commission*, 64 NY2d 688 [1984]).

F. The mailing evidence required is two-fold. First, there must be proof of a standard procedure used by the Division for the issuance of statutory 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 (*Matter of United Water New York*, Tax Appeals Tribunal, April 4, 2004; *see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

H. Here, the Division cannot rely on the CMR to establish that the subject notice of deficiency was mailed as addressed to petitioners on January 28, 2015. On the last page of the CMR, the USPS employee indicated that the total number of pieces of certified mail received at the post office was 18,043 by writing such number, placing his or her initials or signature above the same, and affixing a USPS postmark of January 28, 2015. The number of items received at the post office does not comport with the preprinted number of 15,043 listed on the last page of the CMR. Neither the Nagengast nor the Peltier affidavits explain this discrepancy. As such, the CMR does not constitute adequate documentary evidence of both the fact and date of mailing.

I. In addition, the Division did not mail the subject notice of deficiency to petitioners' last known address. Relying on an unsigned copy of petitioners' 2009 nonresident income tax return that listed their address as Shelby Township, Michigan, the Division issued the subject notice of deficiency to petitioners at that address. Contrary to the Division's representative's assertions, the unsigned copy of petitioners' 2009 nonresident tax return was not an amended return, and does not constitute the last return filed by petitioners' prior to the issuance of the subject notice

of deficiency. Rather, it was documentation submitted to the Audit Division in response to the Statement of Proposed Audit Changes issued to petitioners at their Nedrow, New York, address on August 21, 2014. Petitioners filed their resident income tax return for the year 2013 by electronically filing the same on or about April 15, 2014. That 2013 income tax return was the last return filed by petitioners prior to the issuance of notice of deficiency L-042278986, and it lists petitioners' address as Nedrow, New York. As such, the Division did not mail the January 28, 2015 notice of deficiency to petitioners' last known address. Without proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as petitioners actually received the subject notice of deficiency (*Matter of Riehm v Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]). Since there is no evidence as to when the notice of deficiency may have been received, the Request cannot be deemed to be untimely filed and the Division's motion for summary determination must be denied.

J. The Division of Taxation's motion to dismiss the petition or for summary determination is denied, and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
April 5, 2018

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE