

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LAWRENCE E. PENN, III	:	ORDER
	:	DTA NO. 828011
for Redetermination of a Deficiency or for Refund of	:	
New York State and City Personal Income Tax under	:	
Article 22 of the Tax Law and the Administrative Code :	:	
for the City of New York for the Years 2011 through	:	
2013.	:	

Petitioner, Lawrence E. Penn, III, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the Administrative Code for the City of New York for the years 2011 through 2013.

On March 2, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the grounds that the petition did not appear to be timely filed with respect to the tax years 2011 and 2012, and that the Division of Tax Appeals lacked jurisdiction over the tax year 2013, since there was no statutory notice to protest. On May 16, 2017, petitioner, appearing pro se, submitted a letter with attached exhibits in opposition to dismissal. On June 1, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted an affidavit and other documents in support of dismissal.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced June 2, 2017. After due consideration of the documents and

¹ By letter dated May 16, 2017, the due date for the parties to respond to the notice of intent to dismiss was extended until June 2, 2017.

arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals or a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. Petitioner, Lawrence E. Penn, III, filed a petition with the Division of Tax Appeals, on December 12, 2016, attached to which were: a notice of deficiency issued by the Division of Taxation (Division) for the years 2011 and 2012; a statement of proposed audit changes for the year 2013; a copy of a request for a conciliation conference; a notice and demand for the years 2011 and 2012; and documents pertaining to a civil proceeding in which petitioner is a named party.

2. The Notice of Deficiency, Assessment ID Number L-045412254, dated August 24, 2016, was issued to petitioner for tax in the amount of \$445,100.00, plus interest and penalty of \$1,039,075.63, totaling \$1,484,175.63 personal income tax for the years 2011 and 2012.

3. The Notice and Demand, Assessment ID Number L-045412254, dated October 11, 2016, was issued to petitioner in the amount of \$1,490,062.40, which resulted from the unpaid Notice of Deficiency set forth in Finding of Fact 2, with accrued penalty and interest as of the date of the Notice and Demand.

4. Also attached to the petition is a Statement of Proposed Audit Changes, dated August 29, 2016, issued to petitioner for tax in the amount of \$99,814.00, plus interest and penalty of \$219,803.00 totaling \$319,617.00 personal income tax for the year 2013.

5. Attached as an additional exhibit by petitioner is a copy of a request for conciliation conference, along with cover letter, which protests the Notice of Deficiency number L-045412254. This request is signed by petitioner and dated September 1, 2016. The one-page request for conciliation conference is accompanied by the page of instructions as well as a copy of an envelope that is addressed to the Bureau of Conciliation and Mediation Services (BCMS) of the Division. Directly under the printed address for BCMS, there is a line: "Sent: 8/29/16."

6. Petitioner also submitted certain exhibits that relate to a civil proceeding between the Securities and Exchange Commission and petitioner.

7. In the petition, petitioner states that the Division erred in calculating the tax due on alleged stolen proceeds based on a criminal case that has not been finally adjudicated.

8. The notice of intent to dismiss petition advised that the petition was subject to dismissal on the basis that:

"Pursuant to [§ 2008(2)(a)(iii)] of the Tax Law, a petition must be filed within thirty (30) days from the date a statutory notice, such as a notice of deficiency, is issued.

In this case, the Notice of Deficiency under protest, L-045412254-4 was issued to petitioner on August 24, 2016. However, the petition was not filed with the Division of Tax Appeals until December 12, 2016, or one hundred and ten (110) days later. As such, the Division of Tax Appeals is without jurisdiction to hear the merits of the petition.

With respect to the Year 2013, no assessment has been issued. Therefore, the Division of Tax Appeals has no jurisdiction."

9. Petitioner's May 16, 2017 letter in response to the Notice of Intent provides, in relevant part, as follows:

"The Tax Assessment (a collateral consequence of the unlawful indictment) was assessed based on a Grand Larceny plea on March 16, 2015 and subsequent conviction on April 20, 2015. It appears that penalties and

interests [sic] were computed based on an erroneous amount of money in the parallel criminal case.”

10. In order to prove mailing of the Notice of Deficiency under protest, the Division submitted the following in support of the Notice of Intent: (i) an affidavit, dated May 11, 2017, from Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel; (ii) an affidavit, dated March 22, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Management Analysis and Project Services Bureau (MAPS) of the Division; (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked August 24, 2016; (iv) a copy of the Notice of Deficiency, dated August 24, 2016, with the associated mailing cover sheet; (v) an affidavit, dated March 29, 2017, of Melissa Kate Koslow, a supervisor in the mail room of the Division; and (vi) a copy of petitioner’s Form IT-201 Resident Income Tax Return filed for the 2014 tax year that reflects petitioner’s address as the same New York, New York, address listed on the petition and the notice of deficiency.

11. 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 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. 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 “8/24/16.” 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.

12. 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 "Names of Addressee, Street, and PO Address."

13. The CMR in the present matter consists of 19 pages and lists 203 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 19, which contains five entries. Ms. Nagengast 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 August 24, 2016 to each page of the CMR, circled the preprinted number "203," handwrote the number 203 on page 19 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 19. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 203.

14. Page 3 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0024 8071 and reference number L-045412254 was mailed to Lawrence E. Penn, III, at the New York, New York, address listed on the subject Notice of Deficiency. The

corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

15. The affidavit of Melissa Kate Koslow, a supervisor in the mail room since 2010 and currently Head Mail & Supply Clerk, describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and place postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained 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 contained 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. Here, as noted, the USPS employee initialed page 19 and affixed a postmark dated August 24, 2016 to each page of the CMR. The mail room further request 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. Here, the USPS employee complied with this request by both writing the number “203” and circling the number “203” on the last page next to the heading “Total Pieces Received at Post Office.” According to the Koslow affidavit, a copy of the subject notice was mailed to petitioner on August 24, 2016.

16. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel since 2005, describes the Division’s request to the USPS for delivery information on the August

24, 2016 Notice of Deficiency (L-045412254) addressed to Lawrence E. Penn, III. Specifically, using PS Form 3811-A, the Division requested delivery information for the article of mail bearing certified control number 7104 1002 9730 0024 8071 addressed to petitioner as detailed in Finding of Fact 14. The USPS response to this request indicates that the notice was delivered on August 26, 2016 to petitioner's address in New York, New York.

17. The Division submitted a copy of petitioner's Form IT-201 resident income tax return for the tax year 2014 dated April 1, 2015, which lists the same New York, New York, address for petitioner as that listed on the notice of deficiency and petition filed herein.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry, J]). In the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

B. Section 2006(4) of the Tax Law requires the Tax Appeals Tribunal:

“[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter* (emphasis added).”

C. Tax Law § 2008(1), in turn, provides:

“All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency . . . , or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.”

Tax Law § 2008(2)(a)(iii) provides for an expedited hearing, in pertinent part, as follows:

“Notwithstanding any provision of law to the contrary, any person who receives a written notice that advises that person of the imposition of a fraud penalty under this chapter, must file a petition with the division of tax appeals within thirty days of the mailing of that notice (unless that person has requested a conciliation conference as provided in subdivision three-a of section one hundred seventy of this chapter).”²

D. As set forth in the statutory language above, when there is an imposition of a fraud penalty, a petition challenging the statutory notice must be filed within 30 days. Alternatively, a taxpayer may contest a notice of deficiency by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]).

Included as part of the petition filed in this case, petitioner has provided a copy of his Request for Conciliation Conference. Furthermore, petitioner alleges that he filed such a request in his opposition letter to the notice of intent. The Division did not address this issue in its submission.

E. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified mail of the subject statutory notice to petitioner’s 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). To prove the fact and 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

²The Notice of Deficiency does not explicitly state that fraud penalty was imposed. Moreover, neither party submitted a Statement of Proposed Audit Changes for the tax years 2011 and 2012. The notice does advise petitioner, in bold type, that: “**NOTE: You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 9/23/16.**”

particular instance in question” (*Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

F. The Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., August 24, 2016, 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 CMR conforms with the address listed on petitioner’s New York State income tax return for the year 2014, which satisfies the “last known address” requirement in Tax Law § 681(a). It is concluded that the notice was properly mailed to petitioner on August 24, 2016, and the statutory 30-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][a]; § 2008[2][a][iii]).

G. Section 3000.9(a)(4) of the Tax Appeals Tribunal’s Rules of Practice and Procedure (Rules) allows the supervising administrative law judge on his own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]). Inasmuch as a determination issued following a notice of intent would have the same impact as a determination issued following a motion to dismiss, it is appropriate to apply the same standard of review to a notice of intent.

H. As provided in section 3000.9(b)(1) of the Rules, 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 act is presented.” “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]). 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, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]).

I. In reviewing the record, there appears to be a question regarding whether petitioner timely filed a request for conciliation conference. A copy of such a request is included in the record, however, there is no conciliation order attached to the petition. Additionally, the Division does not address the issue of whether a request for conciliation conference was filed with BCMS. The date that petitioner filed his request for conciliation conference with BCMS is a material issue of fact. It bears on the issue of whether the request was timely filed and whether petitioner timely filed his petition with the Division of Tax Appeals. 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 [2d Dept 1960]).

J. Based on the record presented, there appears to be a triable issue of fact and, accordingly, the notice of intent to dismiss petition, dated March 2, 2017, is withdrawn. The

Division of Taxation shall have 75 days from the date of this order to file an answer to petitioner's petition, after which time a hearing will be scheduled in due course.

DATED: Albany, New York
August 24, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE