

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PATRICIA MARRERO : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 828100
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Years 2010 through 2012. :
:

Petitioner, Patricia Marrero, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2010 through 2012.

On March 30, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were granted an extension of time to July 17, 2017 to respond to the proposed dismissal. On June 15, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Ellen K. Roach, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., of counsel), responded on July 17, 2017. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on July 17, 2017. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of deficiency for the years 2010, 2011 and 2012.

FINDINGS OF FACT

1. On February 21, 2017, petitioner, Patricia Marrero, filed a petition with the Division of Tax Appeals challenging a notice of deficiency, assessment number L-045564631, dated October 20, 2016 (notice) issued by the Division of Taxation (Division) for the years 2010, 2011 and 2012.

2. On March 30, 2017, Herbert M. Friedman, Jr., Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition indicates that:

“A protest of a notice of deficiency issued under Article 22 of the Tax Law and the New York City Administrative Code must be filed within ninety (90) days following the issuance of the notice (*see* Tax Law § 689[b]).

Here, the Notice of Deficiency, L-045564631-7, appears to have been issued on October 20, 2016. However, the petition was not filed with the Division of Tax Appeals until February 21, 2017, or one hundred and twenty-four (124) days later. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.”

3. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents, (i) an affidavit of Ellen K. Roach, a senior attorney employed in the Division’s Office of Counsel, dated June 13, 2017; (ii) an affidavit, dated May 10, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked October 20, 2016; (iv) an affidavit, dated May 16, 2017, of Melissa Kate Koslow, a supervisor in the Division’s mail room; (v) a copy of a notice of deficiency, number L-045564631-7, dated October 20, 2016, and cover sheet addressed to petitioner at 321 Monroe Street, Apt 3, Hoboken, New Jersey 07030; (vi) a copy of a notice of deficiency, number L-045564631-7, dated October 20, 2016, and cover sheet addressed to R

Becerra, as petitioner's then representative, at 302 7th Street, Hoboken, New Jersey 07030; and (vii) a copy of petitioner's e-filed resident income tax return for the year 2015, dated April 13, 2016, and providing for electronic funds withdrawal from petitioner's bank account on April 18, 2016 for the tax amount reported due. Petitioner's 2015 return lists the same Hoboken, New Jersey, address for petitioner as that listed on the subject notice. Petitioner's 2015 return also lists petitioner's then representative as Ray Becerra at the same address listed on the copy of the subject notice sent to the representative. Ms. Roach avers that petitioner's 2015 return was the last return filed with the Division by petitioner before said notice was issued and that the address listed thereon was petitioner's last known address.

4. 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. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "10/20/16." 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 State 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.

5. 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." Additionally, according to the Nagengast affidavit, the remaining headings list appropriate postage and fees. A review of the subject CMR reveals that the headings for postage and fees appear on the last page, indicating postage and fees for the total pieces and amounts of certified mail.

6. The CMR in the present matter consists of 22 pages and lists 240 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 22, which contains 9 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 October 20, 2016 to each page of the CMR, wrote and circled the number "240" on page 22 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 22. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 240.

7. Page 1 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3491 and reference number L-045564631 was mailed to "MARRERO-PATRICIA" at the Hoboken, New Jersey, 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 the name “MARRERO-PATRICIA” and address as noted.

8. Additionally, page 1 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0036 3507 and reference number L-045564631 was mailed to “R BECERRA” at 302 7th Street, Hoboken, New Jersey. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and the name “R BECERRA” and address as noted.

9. The affidavit of Melissa Kate Koslow describes the Division’s mail room’s general operations and procedures. The mailroom 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 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 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.

10. A review of the CMR, attached as exhibit “A” to the Nagengast affidavit, reveals that each page of the CMR contains a USPS postmark dated October 20, 2016. However, according

to Ms. Koslow, the CMR was delivered to the USPS by the Division's mail room staff on August 22, 2016.

11. Ms. Koslow further states that based on her review of the Nagengast affidavit and exhibits attached thereto, and her personal knowledge of the procedures of the mail room, she can attest that on August 22, 2016, an employee of the mail room delivered one piece of certified mail addressed to "MARRERO-PATRICIA, 321 MOROE STREET APT. 3, HOBOKEN, NJ 07030" and one piece of certified mail addressed to "R BECERRA, 302 7TH STREET, HOBOKEN, NJ 07030" to the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail. In contrast, as noted in Findings of Fact 6 and 10, the Nagengast affidavit and CMR indicate that the subject pieces of mail were delivered to the USPS on October 20, 2016.

CONCLUSIONS OF LAW

A. The standard of review for a notice of intent to dismiss is the same as that for a motion for summary determination (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). A summary determination motion "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]).

Section 3000.9(c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant for summary determination "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 the Tribunal noted in *Matter of United Water New York*:

“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]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of 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], *quoting Zuckerman*). Regardless of the sufficiency of the opposing papers, however, the failure of the proponent of the motion to make a prima facie showing of entitlement to judgement as a matter of law requires denial of the motion (*Winegrad* at 853).

B. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a statutory notice, including the notice at issue here (Tax Law §§ 170[3-a][a]; 689; 2006[4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer’s protest is in question, the initial inquiry is on the mailing of the statutory notice because a properly mailed notice or conciliation order creates a presumption that such document was delivered 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).

D. The evidence required of the Division in order to establish proper mailing 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 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 Koslow affidavits establish the Division’s standard mailing procedure. These affidavits and their exhibits, however, do not unquestionably demonstrate that such procedures were followed in this case. Specifically, while the Nagengast affidavit attests that the subject notice was sent to petitioner and her then representative on October 20, 2016, and the attached exhibits, including the CMR and notice, are both dated October 20, 2016, the Koslow affidavit, in contrast, states that the notices addressed to petitioner and her then representative were delivered to the USPS on August 22, 2016. The contradiction of dates between the affidavits might be explained as office error, particularly where, as here, 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). However, such assumption cannot be made on an accelerated determination, where the affidavits submitted by the Division are contradictory and fail to adequately describe the relevant

CMR, thereby failing to establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The contradiction of dates as stated in the Division's affidavits creates a question of fact and, as such, the Division's proof "fails to meet the exacting standard demanded of proponents of an accelerated determination" (*see Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017).

F. Petitioner raises a number of additional arguments in opposition to the notice of intent to dismiss. Based on the foregoing, it is unnecessary to address petitioner's additional arguments at this point.

G. The notice of intent to dismiss petition issued to Patricia Marrero dated March 30, 2017, is withdrawn and the Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
October 12, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE