

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
IESHA M. MCNICHOLS : ORDER
 : DTA NO. 828845
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article :
22 of the Tax Law for the Years 2015 and 2016. :

Petitioner, Iesha M. McNichols, 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 years 2015 and 2016.

On March 22, 2019, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). On May 21, 2019, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), filed a letter in support of dismissal. Petitioner did not respond to the notice of intent to dismiss petition. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order began on June 6, 2019. After due consideration of the Division of Taxation's response to the notice of intent to dismiss petition, and upon all pleadings and proceedings had herein, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether the petition in this matter should be dismissed for lack of jurisdiction and because the petition was not filed in accordance with 20 NYCRR 3000.3.

FINDINGS OF FACT

1. On August 7, 2018, petitioner, Iesha M. McNichols, filed a petition with the Division of Tax Appeals.

2. The petition includes the following documents, as pertinent to the issues herein:

(i) a notice of disallowance dated June 21, 2017, issued to petitioner for the tax year 2015 and bearing audit case ID X-762969058 for the year 2015. The notice states that the Division was disallowing petitioner's claim for refund because the documentation petitioner had submitted was insufficient to substantiate her claimed child and dependent care expenses, as no copies of the front and back of checks used to pay the providers were included;

(ii) a conciliation default order, CMS No. 276446, dated January 5, 2018, and issued by the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The conciliation default order references the refund denial dated June 21, 2017 for the tax year 2015.

(iii) a single page of a letter dated March 13, 2017, issued by the Division to petitioner for the tax year 2016, referencing audit case ID X-006291787. The letter states, in pertinent part, that:

“We need additional information about the amounts claimed on your New York State income tax return.

We've reviewed your tax return for the above year. We need more information about your claim for the Child and Dependent Care Credit (Form IT-216).

Please send us copies of the following documentation so we can determine the amount of your tax refund.”

The letter proceeded to specify the type of documentation petitioner needed to submit, which included proof of relationship and proof of residence. The single page of the letter states that the letter was “continued on back” but the reverse side of the page was not included with the petition.

3. The petition does not reference or attach any other statutory notice.

4. The Division of Tax Appeals sent a letter to petitioner dated November 9, 2018, advising petitioner that “the Division of Tax Appeals cannot consider a petition unless the proper

notice/assessment/denial is provided.” The letter noted that such document was not attached to the petition, asked petitioner to supply the missing document within 15 days, and informed petitioner that the failure to timely furnish the missing document might result in the dismissal of the petition.

5. Petitioner did not respond to the foregoing letter. In turn, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent), dated March 22, 2019. The notice of intent stated that the petition did not appear to have been timely filed because the conciliation default order appears to have been issued on January 5, 2018, while the petition was not filed with the Division of Tax Appeals until August 7, 2018, or in excess of 90 days. The notice of intent further stated that the petition, as filed, was not in the proper form to allow for further action thereon because petitioner “neglected to include the statutory notice under protest for the tax year 2016.” The notice of intent advised petitioner of the Division of Tax Appeals’ intent to dismiss the petition “pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that it was not timely filed, and that the petition is in insufficient form to confer jurisdiction upon the Division of Tax Appeals to consider its merits.” The notice of intent gave the parties 30 days to submit written comments on the proposed dismissal.

6. Petitioner did not respond to the notice of intent, while the Division responded by letter dated May 21, 2019, in which it indicated that the petition as submitted was not in a proper form because petitioner had not included a statutory notice for 2016 and that, therefore, the petition should be dismissed under Tax Law § 2008 and 20 NYCRR 3000.3. The Division’s letter did not comment on the timeliness issue for 2015 or provide any mailing records.

CONCLUSIONS OF LAW

A. The petition in this matter seeks refunds for 2015 and 2016. The notice of intent issued to petitioner herein gave two grounds for the proposed dismissal of the petition. For 2015, the notice of intent proposed that the petition should be dismissed because the petition appeared to be untimely filed for that year since the conciliation default order sustaining the Division's denial of petitioner's refund claim was dated January 5, 2018, while the petition was not filed until August 7, 2018. For 2016, the notice of intent proposed dismissal on the ground that the petition's timeliness could not be determined because the petition did not include a copy of any statutory document giving rise to the right to a hearing, as required under 20 NYCRR 3000.3 (b) (8). These two bases for dismissing the petition will be considered separately below.

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination, and this matter shall proceed under that standard.

C. 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]).

D. For 2015, the timeliness of petitioner's protest of the conciliation default order is at issue. Where, as here, the timeliness of a taxpayer's protest of a conciliation order is in question, the initial inquiry is on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Zigerelli*, Tax Appeals Tribunal, September 20, 2012; *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 (*Matter of Katz*).

E. 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).

F. In its response to the notice of intent, as its sole argument in support thereof, the Division argues that the petition should be dismissed “[a]s the petition is not in proper form . . . [because] the petitioner neglected to include a statutory notice under protest for the tax year 2016.” Thus, the Division did not address the timeliness of the petition’s protest of the conciliation default order, which related to the Division’s denial of petitioner’s refund claim for the tax year 2015, or produce any mailing records related thereto. Given the Division’s burden of showing when the conciliation order was mailed (*see Matter of Katz; Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993), its failure to address that issue, let alone submit any evidence relating thereto, necessitates the rescission of the notice of intent with regard to the tax year 2015.

G. With regard to the refund sought for the tax year 2016, petitioner did not attach any statutory document to the petition. Section 3000.3 (b) (8) of the Rules of Practice and Procedure of the Tax Appeals Tribunal mandates that “for the sole purpose of establishing the timeliness of the petition,” the petition shall contain a copy of the conciliation order or statutory notice being

protested. Here, despite petitioner not producing any statutory document for the tax year 2016, the petition should not be dismissed with regard to petitioner's protest concerning her refund claim for that tax year. The petition included a letter, dated March 13, 2017, issued by the Division to petitioner, requesting more information about the claim for the child and dependent care credits petitioner made on her 2015 return, which information was needed, according to the letter, to allow the Division to process petitioner's "tax refund." Thus, the Division's March 13, 2017 letter is sufficient to show that petitioner had filed a refund claim with the Division that was still pending as of that date. Under Tax Law § 689 (c), a taxpayer may file a petition with the Division of Tax Appeals seeking a refund under article 22 of the Tax Law if:

- “(1) the taxpayer has filed a timely claim for refund with the tax commission,
- (2) the taxpayer has not previously filed with the tax commission a timely petition under subsection (b) for the same taxable year . . .
- (3) either (A) six months have expired since the claim was filed, or (B) the tax commission has mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim in whole or in part.”

That section further provides that, in general, “[n]o petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance” (Tax Law § 689 [c] [4]).

Applying these rules here, it is possible to determine that the petition is timely in regard to the refund sought for 2016. If the Division did issue a notice of disallowance with regard to the refund claim sought by petitioner's 2016 return, the Division has produced no proof as to when the notice of disallowance was issued. Logically, any notice of disallowance would have been issued sometime after the Division's March 13, 2017 letter requesting more information about that refund claim, which means that the petition filed by petitioner on August 7, 2018, was

a timely protest of any such notice of disallowance because it was filed within two years thereof (*see id.*). Alternatively, if the Division did not issue petitioner a notice of disallowance, either the Division granted the refund, which the Division has not alleged or shown, or the refund claim would have been deemed denied at the time petitioner filed her petition on August 7, 2018 and the two-year period for protesting such a deemed denial of the refund claim would not have expired (*see* Tax Law § 689 [c] [3] [A]; *Matter of Diaz*, Tax Appeals Tribunal, March 17, 2011; *Matter of Yoell-Mirel*, Tax Appeals Tribunal, September 21, 2015). In sum, because under this statutory arrangement and the circumstances here, no statutory document is needed to know that petitioner's protest with regard to her refund claim for tax year 2016 is timely, the notice of intent should be rescinded with regard to that tax year also.

H. The notice of intent to dismiss petition, dated March 22, 2019, is hereby rescinded, the petition is accepted, and the Division of Taxation shall file its answer to the petition within 75 days of the date of this order.

DATED: Albany, New York
August 29, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE