

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
DENISE PALERMO
for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Year 2013.

ORDER
DTA NO. 829531

Petitioner, Denise Palermo, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion on February 24, 2020, to dismiss the petition or, in the alternative, for summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Maria Matos, Esq., dated February 21, 2020 and annexed exhibits. Petitioner, appearing pro se, did not respond to the motion. Based upon the motion papers and documents submitted, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed her petition with the Division of Tax Appeals after the issuance of a notice of deficiency.

FINDINGS OF FACT

1. On August 20, 2019, petitioner, Denise Palermo, filed a petition with the Division of Tax Appeals protesting notice of deficiency (notice), assessment number L-046022573, dated March 20, 2017.

2. The Division of Taxation (Division) states that the notice was issued to petitioner electronically pursuant to Tax Law § 35.

3. In support of dismissal and to prove the issuance of the notice under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated February 21, 2020, of Maria Matos, Esq.; (ii) an affidavit, dated February 20, 2020, of Shelby Jacobsen, a Taxpayer Services Specialist 3 and Team Lead of the External Communication Unit of the Division; (iii) a copy of the Division's Online Services (OLS) Account Terms and Conditions for Individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email;" (v) a screenshot of petitioner's OLS "View Online Services Account;" (vi) correspondence from the Division to petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) the subject notice dated March 20, 2017; (ix) a copy of petitioner's "Event Management Transaction Log" within the e-Manages Process for an Integrated Revenue Enterprise (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; (xi) the Division's printout of "Delivery Details by Template ID;" and (xii) the Division's printout of electronic message delivery status.

4. The affidavit of Shelby Jacobsen sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications, including electronic statutory notices. Ms. Jacobsen has been Team Lead of the External Communication Unit of the Division since May 2018. As part of Ms. Jacobsen's duties, she

manages the processing and delivery of taxpayer specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. Taxpayers may open an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

5. The Division's OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer's use of an OLS account, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

6. In the "manage email" section of an OLS account, an account holder must affirmatively opt-in to receiving tax bills and related statutory notices via electronic communication by checking a box labeled "Bills and Related Notices – Get emails about your bills." The account holder must then click on the "Save" button to register, which records the account holder's

authorization to receive same electronically. Immediately above the save button is an acknowledgment section which provides:

“By selecting one or more of the choices above and clicking **Save**:

- I agree to receive tax bills and similar account notices electronically at my online services account.
- I understand that I will no longer receive those communications via physical (postal) mail.
- I understand that my right to challenge bills received through my online services account is the same as that for paper bills.”

7. Petitioner opened an OLS account with the Division on May 8, 2013 under her name, taxpayer identification number, and user identification number, using a Logon ID of “den***mo” and an email address of den***mo@***.com. Petitioner’s OLS account for this user identification number and email address remains active to date.¹

8. In the “manage email” section of petitioner’s OLS account described in finding of fact 6, petitioner checked the boxes labeled “Bills and Related Notices – Get emails about your bills” and “Other Notifications – Get emails about refunds, filings, payments, account adjustments, etc.”

9. On May 14, 2013, the Division sent an acknowledgment to petitioner, confirming her creation of the OLS account on May 8, 2013, under the username of “den***mo.”

10. The Division’s advanced function presentation (AFP) system initiates billing printouts. The AFP system uses the Division’s DZ4010Z retrieve view data (RVD) program. The RVD program verifies email eligibility based on the internal taxpayer ID, tax type and billing form. The RVD program uses internal taxpayer ID, user ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

¹ The user identification and email address are partially redacted to preserve confidentiality.

11. When a statutory notice is scheduled to be issued to a taxpayer under this procedure, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS message center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

12. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their message center upon logging in to the OLS. The statutory notice is viewable in the message center section of the taxpayer's OLS account.

13. On March 20, 2017, the Division posted a message stating, "You have a new liability due" to petitioner's OLS account and sent a corresponding email alert to petitioner's email address of den***mo@***.com. A screenshot of petitioner's OLS account summary indicating the posting of these messages is in the record. Also, on March 20, 2017, the Division posted a notice of deficiency, assessment number L-046022573, to petitioner's OLS account, which was stored in her OLS message center.

14. The Division maintains delivery information of email alerts in the delivery details by template ID (delivery details). The delivery details relevant to the present case indicate that the Division sent an email alert to petitioner at her email address of den***mo@***.com on March

20, 2017, with APL Tracking ID MG032020174533298. The delivery details indicate the status of the email sent to petitioner on March 20, 2017 as “D” (delivered).

15. Ms. Jacobsen avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division’s External Communication Unit on March 20, 2017. However, as set forth in finding of fact 4, Ms. Jacobsen was not in her current job title on March 20, 2017 and, therefore, without additional information, appears to lack personal knowledge of events that occurred in the External Communications Unit on March 20, 2017.

CONCLUSIONS OF LAW

A. The Division filed a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). A motion for summary determination is properly 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]).

The standard of review on a motion to dismiss is the same as that for a summary determination motion (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016).

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 notice of deficiency (*see* Tax Law §§ 681 [b]; 170 [3-a] [a]). 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. It is well established that where the timeliness of a taxpayer’s protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of issuance of the relevant statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November

14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). These standards are based on a statute requiring that a notice of deficiency be mailed in order to be properly issued (*see* Tax Law § 681 [a]).

D. The subject notice in this case was issued electronically. The furnishing of notices by such means of communication is authorized by Tax Law § 35, which provides:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”

Although the means by which notices of deficiency of personal income tax are properly issued differ under Tax Law §§ 35 and 681 (a), the Division’s burden to show that it had a standard procedure for issuing notices and that such procedure was followed in a particular instance remains (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018; *Matter of Perez*, Tax Appeals Tribunal, November 12, 2015). More specifically, where a statutory notice is issued pursuant to Tax Law § 35, the Division must demonstrate its standard procedures for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders, and that such procedures were followed in the particular instance (*id.*).

Turning to the specific facts in this case, the Division submitted the affidavit of Shelby Jacobsen, and the documentary evidence attached thereto, to support its standard procedures for electronic issuance of the notice at issue. The notice in this case is dated March 20, 2017.

However, Ms. Jacobsen was not employed in her current position of Team Lead in the External Communications Unit of the Division at that time. In fact, Ms. Jacobsen was not in her current position until May 2018. As such, without any reference by her as to the basis for her knowledge of the Division's standard of practice for electronic issuance of notices prior to her current employment, the Division has failed to establish its standard procedure for issuance of the notice herein.

As noted above, the Division bears the burden of showing proper issuance of the statutory notice, including the standard procedure for issuance and the fact it was issued on a specific date, where it seeks accelerated determination for lack of subject matter jurisdiction due to a late-filed petition (*Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017). In this case, whether the notice was electronically mailed to petitioner, as claimed, is a material issue of fact and, as such, cannot be determined by a motion to dismiss (20 NYCRR 3000.9 [a]).

E. Accordingly, the Division of Taxation's motion to dismiss is denied and a hearing will be scheduled in due course.

DATED: Albany, New York
June 18, 2020

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE