

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TRACY CASSANDRO	:	ORDER
	:	DTA NO. 829534
For Redetermination of a Deficiency or Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2007 through 2009.	:	

Petitioner, Tracy Cassandro, filed a petition for redetermination of a deficiency or refund of personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2007 through 2009.

On December 20, 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 the grounds that the petition did not appear to be timely filed. By request of the Division of Taxation, the 30-day period to respond to the notice of intent to dismiss petition was extended to March 6, 2020. On January 17, 2020, petitioner, appearing by Michael G. Norman, submitted a letter in opposition to dismissal. On February 21, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order commenced on March 6, 2020. After due consideration of the documents and 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 following the issuance of a conciliation order.

FINDINGS OF FACT

1. This matter concerns a notice of deficiency (notice), assessment number L-048814301, issued to petitioner, Tracy Cassandro, for additional income taxes due for the years 2007 through 2009. A copy of the notice is not in the record. In protest of this notice, petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) on October 19, 2018. In her request, petitioner alleged that the assessment was based on funds received by her husband in his business dealings, that she should be treated as an innocent spouse and that she no longer files joint returns with her husband, among other factors.

2. A conciliation conference was held and by conciliation order, CMS No. 304715, dated July 19, 2019, the notice was sustained in full.

3. On August 28, 2019, the Division of Tax Appeals received a petition from petitioner, which protested a conciliation order issued to her. The envelope containing the petition bears a metered postmark of August 26, 2019. The conciliation order, CMS No. 304715, dated July 19, 2019, was issued to petitioner at an address in Woodbury, New York.

4. On December 20, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner. The notice of intent indicated that the relevant conciliation order was issued on July 19, 2019, but that the petition was not filed until August 26, 2019, or 38 days later.

5. To show proof of proper mailing of the conciliation order dated July 19, 2019, the Division submitted: (i) the affidavit of Christopher O'Brien, Esq., an attorney employed by the

Division, dated February 20, 2020; (ii) a copy of petitioner's request that lists a Woodbury, New York, address for petitioner; (iii) an affidavit of Joseph DiGaudio, Assistant Supervisor of Tax Conferences of BCMS, dated January 31, 2020; (iv) a "Certified Record for Manual Mail" (CMR) postmarked July 19, 2019; (v) a copy of the conciliation order and cover letter, dated July 19, 2019, that lists a Woodbury, New York address for petitioner; and (vi) an affidavit of Fred Ramundo, a supervisor in the Division's mail room, dated February 4, 2020. It is noted that petitioner stated the same Woodbury, New York, address in her petition filed with the Division of Tax Appeals that was used on her request.

6. The affidavit of Joseph DiGaudio, who has been in his current position of Assistant Supervisor of Tax Conferences since November of 2014, sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the conciliation orders by United States Postal Service (USPS), via certified mail, and confirmation of such mailings through receipt by BCMS of a postmarked copy of the CMR.

7. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signatures. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

8. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing (AFP) Unit. For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

9. The AFP Unit also produces a computer-generated CMR entitled “Certified Record for Manual Mail.” The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “Certified No.” The BCMS numbers are recorded on the CMR under the heading “Reference No.” and are preceded by three zeros (000). The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk’s regular duties include associating each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

11. The “Total Pieces and Amounts” is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the bottom left corner of the CMR.

12. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, “7-19-19” was written in the upper right corner of each page of the CMR.

13. The CMR, along with the envelope containing the cover sheets, cover letters and conciliation orders are picked up from BCMS by an employee of the Division’s Mail Processing Center.

14. Mr. DiGaudio attests to the truth and accuracy of the copy of the seven-page CMR, which contains a list of the conciliation orders issued by the Division on July 19, 2019. The

CMR lists 79 certified control numbers. Each certified control number is assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number and the name and address of the addressee.

15. Information regarding the conciliation order issued to petitioner is contained on page six of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 5009 3466 is reference or CMS number 000304715, along with petitioner's name and her Woodbury, New York, address. Information regarding a copy of the conciliation order issued to petitioner's representative is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 5009 3329 is reference or CMS number 000304715 issued to Michael Norman at his Jericho, New York, address.

16. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a stores and mail operations supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

17. In this particular instance, the postal employee affixed a postmark dated July 19, 2019, to each page of the seven-page CMR. The postal employee wrote the number "79" and initialed page seven to indicate the total pieces of mail received at the post office. The postal

employee also circled the typed number "79" corresponding to the heading "Total Pieces and Amounts" to indicate the number received.

18. Mr. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. 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. Ramundo's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

19. Based upon his review of the affidavit of Mr. DiGaudio, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on July 19, 2019, an employee of the Mail Processing Center delivered items of certified mail addressed to petitioner at her Woodbury, New York, address and to petitioner's representative at his Jericho, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner and her representative on July 19, 2019.

20. In her response to the notice of intent, petitioner does not dispute that the notices were issued to her and her representative on July 19, 2019, but rather, she disputes the time frame within which she was required to file her petition with the Division of Tax Appeals. The Division alleges that fraud penalties were asserted and, as such, petitioner had 30 days to file her petition. Petitioner argues fraud was not asserted and, thus, she had 90 days from issuance of the conciliation order to file her petition with the Division of Tax Appeals.

CONCLUSIONS OF LAW

A. Where, as here, the timeliness of a petition 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 particular instance in question” (*Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

B. The Division has offered proof sufficient to establish the mailing of the conciliation order to petitioner at her last known address and to her representative on July 19, 2019. The CMR has been properly completed and, therefore, constitutes highly probative 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). Additionally, there is no dispute that petitioner and her representative received the conciliation orders.

C. The issue in this case is whether petitioner had 30 days or 90 days within which to file a petition contesting the conciliation order. 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).”

D. 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).”

E. 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]).

F. 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.

G. 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 fact 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 issue 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]).

H. In reviewing the record, there appears to be a question regarding whether the Division imposed fraud penalties which would result in an expedited hearing pursuant to Tax Law § 2008 (2) (a) (iii). A copy of the notice issued to petitioner is not in the record. Without the notice, it is unclear whether fraud penalty was asserted in this case. This fact bears on the issue of the statutory time frame in which to file a protest of the notice and, thus, whether petitioner timely filed her 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]).

I. Based on the record presented, there appears to be a triable issue of fact and, accordingly, the notice of intent to dismiss petition, dated December 20, 2019, 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
June 4, 2020

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE