

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
SAMI ISSA	:
	: ORDER
	: DTA NO. 829585
for Redetermination of Deficiencies or for Refund of	:
New York State and New York City Personal Income	:
Taxes under Article 22 of the Tax Law and the New	:
York City Administrative Code for the Years 2015 and	:
2016.	:

Petitioner, Sami Issa, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the New York City Administrative Code for the Years 2015 and 2016.

On February 6, 2020, the Division of Taxation, by Amanda Hiller, Esq. (Michael Trajbar, Esq. of counsel), filed a motion seeking to have the petition dismissed, or, in the alternative, granting summary determination in the above-captioned matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Petitioner, appearing pro se, did not respond to the motion. The 90-day period for issuance of this order commenced on March 9, 2020. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of deficiency L-046926951.

II. Whether the Division of Taxation's motion for a determination dismissing petitioner's petition or granting summary determination in its favor should be granted.

FINDINGS OF FACT

1. Petitioner, Sami Issa, timely filed a 2016 New York resident income tax return, form IT-201 (2016 return), providing an address of "8302 6 Ave Apt B4, Brooklyn, NY 11209."

2. The Division of Taxation (Division) issued petitioner notice of deficiency L-046926951 for tax year 2016 on September 25, 2017 and notice of deficiency L-048845565 for tax year 2015 on November 20, 2018. The notices are both addressed to petitioner at "8302 6th Ave Apt B4 Brooklyn, NY 11209."

3. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) regarding notice L-048845565, and by conciliation order number 000305457, dated June 28, 2019, BCMS sustained notice L-048845565. A copy of this request is not in the record.

4. Petitioner requested a conciliation conference with BCMS regarding notice L-046926951 on August 5, 2019. On his request, petitioner provided his address as "8302 6 Ave, Apt B4, Brooklyn, NY 11209." BCMS dismissed petitioner's request as untimely by conciliation order dismissing request (order) number 000313438, dated August 23, 2019. The order provided that notice L-046926951 was issued on September 25, 2017, more than 90 days before petitioner requested a conference.

5. Petitioner appealed both BCMS orders by filing a petition with the Division of Tax Appeals on September 20, 2019. In his petition, petitioner challenged notices L-048845565 and L-046926951 and alleged that he submitted documents with the requests to BCMS, but they never responded to him or his tax preparer. Petitioner also alleged in the petition that he provided documents showing his income, children's birth certificates, letters from his family doctor, and letters from his children's school, confirming that they are patients of the doctor and enrolled in school.

6. On December 18, 2019, the Division filed its answer to the petition, affirmatively alleging, among other things, that petitioner's challenge to notice L-046926951 was untimely because petitioner failed to file a request for a conference with BCMS or a petition with the Division of Tax Appeals within 90 days of its issuance.

7. On February 6, 2020, the Division filed a motion seeking the dismissal of the petition, or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of the motion, the Division provided the following documents: (i) an affidavit of Michael Trajbar, Esq., sworn to on February 5, 2020; (ii) an affidavit of Deena Picard, sworn to on January 27, 2020; (iii) a certified mail record (CMR) entitled "Certified Record for – DTA-962-F-E – Not of Def Follow Up" postmarked September 25, 2017; (iv) a copy of notice L-046926951 with its associated mailing cover sheet; (v) an affidavit of Fred Ramundo, sworn to on February 4, 2020; (vi) a copy of the first page of petitioner's request for conciliation conference for notice L-046926951, dated August 5, 2019; (vii) a copy of the conciliation order dismissing request for notice L-046926951; and (viii) a copy of petitioner's 2016 return.

8. Michael Trajbar, an attorney in the Office of Counsel of the Division, asserts in his affidavit that petitioner's 2016 return was filed on February 9, 2017, and that this was the last return filed before the Division issued notice L-046926951. He also avers that when notice L-046926951 was issued, petitioner's last known address was "8302 6th Ave., Apt. B4, Brooklyn, NY 11209."

9. Deena Picard has been the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS) since May 2017. She is also a Data Processing Fiscal Systems Auditor 3 and has held that position since February 2006. In performing her duties for both positions, Ms. Picard has used the Divisions' electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Acting Director of MAPS, which is responsible for the receipt and storage of certified mail records, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Picard's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

10. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

11. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." The statutory notice 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

12. All pages of the CMR are banded together when the documents are delivered to the Division's mail room 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.

13. Here, the CMR for the notices issued by the Division on September 25, 2017, including notice L-046926951, consists of 57 pages and 794 certified control numbers along with corresponding assessment numbers, names and addresses. Each page consists of 12 to 15 entries, with the exception of page 57, which contains 1 entry. Ms. Picard 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.

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 is manually changed on the first and last page of the CMR to the actual date of mailing. In the instant case, the actual mailing date as handwritten on the first and last page of the CMR was "9/25/17." A USPS representative affixed a postmark, dated September 25, 2017, to each page of the CMR, wrote "794" on page 57 next to the heading "Total Pieces Received at Post Office," and initialed the page.

14. Page 24 of the CMR indicates that notice L-046926951 with certified control number 7104 1002 9735 3832 7217 was mailed to petitioner at "8302 6th Ave Apt B4, Brooklyn, NY 11209-4563." The corresponding mailing cover sheet, attached to the Picard affidavit with the

notice as exhibit “B,” bears this certified control number, petitioner’s name, and his address as stated above.

15. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on September 25, 2017.

16. Fred Ramundo, a supervisor in the Division’s mail room, describes the mail room’s general operations and procedures in his affidavit as they relate to statutory notices. Mr. Ramundo has been a supervisor in the mail room since December 2013 and his current title is Stores and Mail Operations Supervisor. As a mail room supervisor, Mr. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices.

The mail room receives statutory notices that are ready for mailing in an “Outgoing Certified Mail” area. The mail room also receives the corresponding CMR for each batch of notices. The staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail 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 writes his or her initials or signature on the CMR, indicating receipt by the post office. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and

retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

17. Mr. Ramundo avers that each page of the CMR in exhibit "A" of the Picard affidavit contains a postmark of September 25, 2017 and that a USPS employee initialed or signed page 57 of the CMR and wrote the total number of pieces of certified mail. A review of the CMR confirms this assertion.

18. Based on his review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and his personal knowledge of the procedures of the mail room, Mr. Ramundo stated that on September 25, 2017, an employee of the mail room delivered one piece of certified mail addressed petitioner at "8302 6th Ave Apt B4, Brooklyn, NY 11209-4563," to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery. He also stated the CMR delivered to the USPS on September 25, 2017 was returned to the Division. Mr. Ramundo attested that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on September 25, 2017.

CONCLUSIONS OF LAW

A. The Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal or a motion for summary determination under section 3000.9 (b). In making these motions, the Division made a general request for relief. As the petition in this matter was filed within 90 days of the issuance of the conciliation orders (*see* finding of fact 5), the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination is the proper motion for relief if either of

petitioner's requests for conciliation conference was untimely (*see Matter of Kallianpur*, Tax Appeals Tribunal, May 29, 2019).

B. 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" (20 NYCRR 3000.9 [b]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, demonstrating there are no material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, however, the opposing party must set forth evidentiary proof establishing the existence of a material issue of fact that requires a trial of the action (*see id.*).

C. Petitioner did not respond to the Division's motion and thus, has presented no evidence to contest the facts alleged in the affidavits submitted therewith. Accordingly, such facts may be deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *see also Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017).

D. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with BCMS (*see* Tax Law §§ 681 [b]; 689 [b]; 170 [3-a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one date late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of

deficiency becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petitioner's request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furn.*, Tax Appeals Tribunal, November 25, 1992). To meet its burden, the Division must show it has a standard mailing procedure for the issuance of statutory notices by one with knowledge of the relevant procedures and that the procedure was followed in this instance (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). Where a notice of deficiency of personal income tax is properly mailed, it is valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

F. In this case, the Division has offered proof sufficient to establish the mailing of the notice L-046926951 to petitioner's last known address on September 25, 2017. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). 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 e.g. Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

G. The Division issued notice L-046926951 to petitioner's last known address. "A taxpayer's last known address shall be the address given in the last return filed by him, unless subsequent to the filing of such return the taxpayer shall have notified the [Division] of a change of address" (Tax Law § 691 [b]). Petitioner's address as provided on his 2016 return does not have "th" after the street number, while the address on notice L-046926951 does. Otherwise, they are identical (*see* findings of fact 1, 2, and 14). This difference is inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Accordingly, the Division has offered proof sufficient to establish the mailing of notice L-046926951 to petitioner's last known address. It is thus concluded that the Division properly mailed notice L-046926951 on September 25, 2017, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals in protest of that notice commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]).

H. Petitioner's request for conciliation conference for notice L-046926951 was filed on August 5, 2019. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely (*see* Tax Law §§ 170 [3-a] [b]; 681 [b]) and the same was properly dismissed by the August 23, 2019 conciliation order issued by BCMS. Petitioner has offered no evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

I. The Division has established that petitioner's appeal of notice L-046926951 to BCMS was untimely and it was proper for BCMS to dismiss such notice. Accordingly, the Division's motion for summary determination is granted as to that notice.

J. The petitioner also challenges notice of deficiency L-048845565 (*see* finding of fact 5). None of the papers submitted by the Division in support of its motion for summary determination pertain to notice of deficiency L-048845565. As such, the Division's motion for summary determination is denied with respect to notice L-048845565.

K. The Division's motion for summary determination is hereby granted and the petition is denied with respect to notice of deficiency L-046926951 and the August 23, 2019 conciliation order dismissing request is sustained. With respect to notice of deficiency L-048845565, the matter shall proceed to a hearing in due course.

DATED: Albany, New York
June 4, 2020

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE