

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN AND JENNIFER DIFUCCI :
for Redetermination of a Deficiency or for Refund of : **ORDER**
New York State and New York City Personal Income : **DTA NO. 829609**
Tax pursuant to Article 22 of the Tax Law and the :
Administrative Code of the City of New York for the :
Years 2013 and 2014. :

Petitioners, John and Jennifer DiFucci, filed a petition for redetermination of a deficiency or for refund of personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the years 2013 and 2014.

On July 29, 2020, the Division of Taxation, by Amanda Hiller, Esq. (Peter Ostwald, 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. Petitioners, appearing by Salvatore S. Iavarone, CPA, did not timely respond to the motion.¹ The 90-day period for issuance of this order commenced on August 28, 2020. As a result of the COVID-19 public health emergency, the deadline for the issuance of the order was extended by an additional three months consistent with Tax Law § 2010 (3). Based upon the motion papers and all

¹ Petitioners' opposition to the instant motion was due on August 28, 2020. However, their response was not postmarked until October 10, 2020. Accordingly, their response was late and will not be considered.

pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of deficiency L-048241070 dated June 1, 2018.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued petitioners, John and Jennifer DiFucci, a notice of deficiency dated June 1, 2018, bearing assessment identification number L-048241070 for tax years 2013 and 2014 (June notice). The Division then issued a second notice of deficiency dated August 31, 2018, with the same assessment identification number L-048241070 for the same tax years (August notice). The notices are both addressed to petitioners at an address in Garrison, New York.

2. Petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on August 7, 2019, regarding the June notice. By conciliation order dismissing request number 000313903, dated September 6, 2019, BCMS found that where the June notice was issued on June 1, 2018, but the request for conciliation conference was not received until August 7, 2019, more than 90 days after the issuance of the notice, the request was untimely and dismissed it.

3. Petitioners timely appealed the BCMS order by filing a petition with the Division of Tax Appeals on September 26, 2019. In their petition, petitioners challenged the June notice and alleged that they had requested a conciliation conference multiple times.

4. On July 29, 2020, the Division filed a motion seeking the dismissal of the petition, or, in the alternative, granting summary determination pursuant to sections 3000.5, and 3000.9 (a) and (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 Peter Ostwald, Esq., sworn to on July 29, 2020; (ii) an affidavit of Heidi Corina, sworn to June 18, 2020; (iii) Requests for Delivery Information/Return Receipt, U.S. Postal Service, form 3811-A (form 3811-A) for the June notice with accompanying copies of the June notice sent to petitioners and their representative; (iv) responses to the form 3811-A requests; (v) an affidavit of Deena Picard, sworn to on June 8, 2020; (vi) a certified mail record (CMR) entitled “Certified Record for Presort Mail – Assessments Receivable” postmarked August 31, 2018; (vii) a copy of the August notice; (viii) an affidavit of Susan Saccocio, sworn to on June 12, 2020; (ix) a copy of the first page of petitioners’ request for conciliation conference dated August 7, 2019 for the June notice; (x) a copy of the conciliation order dismissing request for the June notice; and (xi) a copy of petitioners’ Application for Automatic Six-Month Extension of Time to File for Individuals (form IT-370) listing petitioners’ address in Garrison, New York.

5. Peter Ostwald, an attorney in the Office of Counsel of the Division, avers in his affidavit that the Division issued duplicates of assessment ID L-048241070 on June 1, 2018 and August 31, 2018. Mr. Ostwald acknowledges that petitioners petitioned the June notice as referenced in conciliation order 000313903, but the Division’s motion seeks relief regarding both the June notice and the August notice.

With regard to the June notice, Mr. Ostwald avers that a search of the Division’s records did not locate a certified mail record proper for evidentiary submission. He asserted that the

Division prepared three requests using form 3811-A and that the responses indicated actual delivery and receipt of the June notice by both petitioners and their designated representative.

Mr. Ostwald attached a copy of petitioners' Application for Automatic Six-Month Extension of Time to File for Individuals (form IT-370), dated April 7, 2018, asserting it was filed on April 8, 2018 and "was the application filed before the Notices were issued." Mr. Ostwald states that the address appearing on the application is for Garrison, New York, and that such address corresponds to the address appearing on the notices and the petition. However, a review of the petition in this matter shows that the Garrison, New York, address shown on the application and on the notices does not match the addresses used by petitioners on their petition. Each petitioner used a different address in New York, New York.

Mr. Ostwald avers that both the June notice and the August notice were issued to petitioners' last known address. Mr. Ostwald also states that the notices were mailed to petitioners' representative at his address in Clifton Park, New York.

Mr. Ostwald also averred that petitioners faxed their request for conciliation conference to BCMS on August 7, 2019 and the conciliation order dismissing request was issued on September 6, 2019. He asserted that the protest was filed more than 90 days after the June notice was issued, making it untimely and, therefore, the Division of Tax Appeals lacked jurisdiction to review the June notice.

6. Heidi Corina is a Legal Assistant 2 in the Office of Counsel of the Division. As part of her duties, Ms. Corina prepares form 3811-A requests, or she requests that the Division's mailroom does the same on behalf of the Office of Counsel. Form 3811-A is a form used by the mailer to request return receipts after mailing. Ms. Corina asserts that form 3811-A can be sent to

the post office for mail delivered on or after July 24, 2000, and the postal service will provide whatever information they have concerning delivery when delivery can be confirmed.

Ms. Corina averred that in the instant matter, she prepared three requests using form 3811-A. Attached to Ms. Corina's affidavit are copies of the form 3811-A requests that she requested for petitioners and their representative. The first form requests information regarding a piece of mail bearing tracking number 7104 1002 9735 4261 8431 and addressed to petitioners at an address in Garrison, New York. The second form requests information regarding a piece of mail bearing tracking number 7104 1002 9735 4261 8455 and addressed to petitioners' representative in Clifton Park, New York. The third form requests information regarding a piece of mail bearing tracking number 7104 1002 9735 4261 8448 and is addressed to petitioners' representative at the same Clifton Park, New York, address. Also attached to Ms. Corina's affidavit is the postal service's response to the form 3811-A requests.

In response to the first request for the mail with tracking number 7104 1002 9735 4261 8431, there is a letter dated December 13, 2019, that states in part: "The delivery record shows that this item was delivered on June 9, 2018 at 9:46 AM [sic] Located in Garrison NY 12524." The letter also contains a scanned image of the recipient information showing a signature of "John DiFucci" and an address as written of "612."

In response to the second request for the mail with tracking number 7104 1002 9735 4261 8455, there is a letter dated December 13, 2019, that states in part: "The delivery record shows that this item was delivered on June 4, 2018 at 1:30 PM [sic] Located in Clifton Park NY 12065." The letter also contains a scanned image of the recipient information showing an illegible signature and an address as written of "6 Willowbrook Terrace."

In response to the third request for the mail with tracking number 7104 1002 9735 4261 8448, there is a letter dated December 13, 2019, that states in part: “The delivery record shows that this item was delivered on June 4, 2018 at 1:30 PM [sic] Located in Clifton Park NY 12065.” The scanned image of the recipient information is identical to that for tracking number 7104 1002 9735 4261 8455.

7. 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.

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. Ms. Picard also states that each batch of statutory notices is accompanied by a certified mail record (CMR) that lists each statutory notice in the order they are generated in the batch.

The remainder of Ms. Picard's assertions discuss the certified mail record for statutory notices issued on August 31, 2018, the date of the August notice.

8. Susan Saccocio is a manager in the Division's mail room and has held that position since 2017. As a mail room manager, Ms. Saccocio is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Saccocio's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Post Office. In her affidavit, Ms. Saccocio describes the mail room's general operations and procedures as they relate to the mailing of 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. A 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.

The remainder of Ms. Saccocio's affidavit consists of statements regarding the mailing of and the CMR for the notices mailed on August 31, 2018, including the August notice.

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 (Rules) or a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 3), the Division of Tax Appeals has jurisdiction over the petitioner and a motion for summary determination is the proper motion for relief if petitioners' request 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. Petitioners did not respond to the Division's motion and thus, have 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 [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 within 90 days from the date of mailing of such notice (*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 petitioners' 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 petitioners' 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 Katz*).

F. Here, the Division has not produced any evidence that its standard mailing procedure was followed when issuing the June notice (*see* finding of fact 5). The Division has also failed to establish that the June notice was mailed to petitioners' last known address. For the purposes of article 22 of the Tax Law, "a taxpayer's last known address shall be the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address" (Tax Law § 691 [b]; *see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017). In his affidavit, Mr. Ostwald references petitioners' six-month extension application stating "[t]his was the application filed before the Notices were issued" (*see* finding of fact 5). Whether an application is filed is irrelevant for determining the last known address under article 22 of the tax law unless the Division is asserting that such application served as a notification of a change of address (*see Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). However, Mr. Ostwald does not state when this application was filed, whether or not it was filed after petitioners' last return filed, or whether the address provided therein was a change of address from that last return.

G. Where the Division cannot prove proper mailing, the 90-day period for filing either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals is tolled until the taxpayer actually receives the notice (*see Agosto v Tax Commn. of State of N.Y.*, 68 NY2d 891, 893 [1986]; *Matter of Riehm v. Tax Appeals Trib.*, 179 AD2d 970, 971 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *rearg denied* 90 NY2d 893 [1992]; *Matter of Mostovoi*, Tax Appeals Tribunal, August 10, 2017), whereupon the time within which to file a protest will commence (*see Matter of Coleman*, Tax Appeals Tribunal, June 8, 2020; *Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011).

H. The Division has established through the Corina affidavit and the accompanying USPS form 3811-A and USPS response thereto, that a document that was sent using USPS tracking number 7104 1002 9735 4261 8431 was delivered to and accepted by petitioner John DiFucci on June 9, 2018 (*see* finding of fact 6). Additionally, the Division has also established that documents sent using USPS tracking numbers 7104 1002 9735 4261 8455 and 7104 1002 9735 4261 8448 were delivered to petitioners' representative on June 4, 2018 (*see* finding of fact 6). However, the Division's papers are devoid of any sworn statements establishing that the June notice was sent via certified mail using these tracking numbers. While copies of the June notice that were allegedly sent to petitioners and their representatives are attached to the Corina affidavit, no one with personal knowledge of the procedures of the Division confirmed that the page on top of each of these notices was the accompanying mailing cover sheet or that the numbers on this sheet were the same numbers used to send the relevant notice via certified mail so as to make the responses to the applicable form 3811-A requests relevant. Accordingly, material issues of fact exist to prevent summary determination in favor of the Division (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

I. As petitioners have not filed a petition appealing the August notice, the Division of Tax Appeals does not have jurisdiction to consider the Division's arguments regarding such notice.

J. The Division's motion for summary determination is hereby denied and the matter shall proceed to a hearing in due course.

DATED: Albany, New York
December 3, 2020

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE

