

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MOSHE D. AZOGUI : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 829613
Personal Income Taxes under Article 22 of the Tax Law :
and the Administrative Code of the City of New York for :
the Years 2010 through 2014. :

Petitioner, Moshe D. Azogui, 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 2010 through 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), brought a motion filed on May 6, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced 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 by Hodgson Russ LLP (Daniel P. Kelly, Esq., of counsel), received an extension of time within which to file his response to June 30, 2020, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion dated April 30, 2020, for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated December 7, 2018, and bearing assessment identification number L-049240252 (notice). The notice is addressed to petitioner, Moshe D. Azogui, at an address in New York, New York. A copy of this notice was mailed to petitioner's former representative, Brian Henry, at 345 Seventh Avenue, 8th Floor, New York, New York 10001.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On September 13, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on December 7, 2018, but the request was not received until August 28, 2019, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on October 9, 2019.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affidavit of Jennifer L. Hink-Brennan, Esq., sworn to on April 30, 2020, the following with its motion papers: (i) an affidavit, dated January 30, 2020, of Deena

Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 7, 2018; (iii) an affidavit, dated February 4, 2020, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the notice mailed to petitioner and his former representative with the associated mailing cover sheets; (v) a power of attorney form, dated January 15, 2016, authorizing Mr. Henry to represent petitioner for the tax years 2010 through 2013, that listed Mr. Henry's New York, New York, address; (vi) a copy of petitioner's request for conciliation conference; and (vii) a copy of petitioner's New York resident income tax return, form IT-201, for the tax year 2016, dated March 6, 2018.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "12/7." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) 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.

7. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment 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."

8. The CMR in the present matter consists of 26 pages and lists 282 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 26, which contains 7 entries. 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. A USPS representative affixed a postmark, dated December 7, 2018, to each page of the CMR, wrote the number "282" on page 26 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 26.

9. Page one of the CMR indicates that a notice with certified control number 7104 1002 9730 0317 0409 and reference number L-049240252 was mailed to petitioner's former representative at the New York, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and the former representative's name and address as noted. Page two of the CMR indicates that a notice with certified control number 7104 1002 9730 0317 0522 and reference

number L-049240252 was mailed to petitioner at the New York, New York, address listed on the notice. The corresponding mailing cover sheet, also attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room, describes the mail room’s general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further 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. Each page of the CMR in exhibit “A” contained in the Picard affidavit has a USPS postmark date of December 7, 2018. On page 26, corresponding to “Total Pieces and Amounts,” is the preprinted number 282 and next to “Total Pieces Received At Post Office” is the handwritten entry “282.” There is a set of initials or a signature on page 26.

11. According to the Picard and Ramundo affidavits, copies of the notice were mailed to petitioner and his former representative on December 7, 2018, as claimed.

12. In opposition to the Division's motion, petitioner provided, along with the affidavit of Daniel P. Kelly, Esq., the following: (i) a copy of a Freedom of Information Law (FOIL) request made to the Division's Records Access Officer dated October 25, 2019; (ii) the Division's reply to the FOIL request dated January 10, 2020; (iii) correspondence dated June 12, 2018, from Mr. Henry to the Division's auditor that informed the Division that his office address had changed to a Tarrytown, New York, address; (iv) correspondence dated September 12, 2018 from the Division's auditor to Mr. Henry at the Tarrytown, New York, address, informing him that the audit period had been expanded to include the tax year 2014; and (v) the Division's Report of Audit, form AU-241, dated by the auditor on November 29, 2018, that summarizes the audit of petitioner for personal income tax for the years 2010 through 2014, and it indicates the name of Mr. Henry, at the Tarrytown, New York, address.

CONCLUSIONS OF LAW

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9 (a), or summary determination under 20 NYCRR 3000.9 (b). Since the petition was timely filed, the Division of Tax Appeals has subject matter jurisdiction over the issue of the timely filing of a request for a conciliation conference. Therefore, the Division's motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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 and 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]).

C. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law § 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170 [3-a] [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 day 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).

D. Where the timeliness of a petition or a request for a conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (*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 the 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, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. In this case, the mailing cover sheet, cover letter, CMR and affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency establish the Division’s standard mailing procedure and show that the procedure was followed in this instance. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and

fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The mailing cover sheet bears petitioner's name and a New York, New York, address that is identical to the address on his last filed income tax return filed by petitioner prior to issuance of the notice and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner's entry. Petitioner's name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears USPS postmarks dated December 7, 2018. There are 282 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "282" on the line stating "Total Pieces Received at Post Office," and the post office received 282 items for mailing. In short, the Division established that it mailed the notice of deficiency to petitioner by certified mail on December 7, 2018 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

F. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]).

A copy of the notice herein, dated December 7, 2018, was sent to petitioner's former representative at a New York, New York, address. However, the former representative had informed the Division, as early as June 12, 2018, that his office address had changed. Subsequently, the Division addressed future correspondence to the former representative at the Tarrytown, New York address, as early as September 12, 2018. Since the notice was erroneously

mailed to an address in New York, New York, the Division has not proven that its standard procedure for mailing a copy of the notice to petitioner's former representative was followed in this case.

G. The Division of Taxation's motion for summary determination is denied and this matter will proceed to a hearing on the merits.

DATED: Albany, New York
September 24, 2020

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE