

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DIONISIO BAUTISTA : ORDER
AND SILVIA AVELINO : DTA NO. 830416
for Redetermination of a Deficiency or for Refund of :
New York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 2018. :

Petitioners, Dionisio Bautista and Silvia Avelino, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2018. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel), filed a motion on December 13, 2022, 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. Petitioners, appearing pro se, filed a response on January 7, 2023. The 90-day period for issuance of this order commenced on January 12, 2023. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners timely filed a request for a conciliation conference following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. On December 15, 2022, the Division of Taxation (Division) brought a motion dated December 13, 2022 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 petitioners' protest of a notice of deficiency, dated August 21, 2020, and bearing assessment identification number L-051622518 (notice). The motion addresses the timeliness of petitioners' request for conciliation conference. The notice is addressed to petitioners, Dionisio Bautista and Silvia Avelino, at an address in Queens, New York.

2. Petitioners sent a request for conciliation conference (request) to the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request is signed as dated November 18, 2020 and the facsimile cover sheet by which petitioners allegedly filed the request is dated November 17, 2020, while the request was stamped as received by the Division on January 26, 2021. The Division's motion papers do not address how the request was filed.

3. On February 19, 2021, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation order determined that petitioners' 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 August 21, 2020 but the request was not received until January 26, 2021, or in excess of 90 days, the request is late filed.”

4. Petitioners filed a petition with the Division of Tax Appeals in protest of the conciliation order on April 23, 2021.

5. The Division filed an answer dated August 4, 2021, wherein the Division asserts that petitioners failed to timely protest the notice with BCMS.

6. In support of the motion and to show proof of proper mailing of the notice, the Division submitted the following with its motion papers: (i) an affidavit, sworn to December 8, 2022, of Marianna Denier, a Principal Administrative Analyst and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for – DTF-962-F-E – Not of Def Follow Up- DTF-963-F-E –Not of Def Follow Up" (CMR) postmarked August 21, 2020; (iii) an affidavit, sworn to on December 8, 2022, of Susan Ramundo, a manager in the Division's mail room; (iv) a copy of the notice mailed to petitioners with the associated mailing cover sheet; and (v) a copy of petitioners' 2019 e-filed IT-201 resident income tax return (form IT-201), filed on February 18, 2020, which was the last return filed with the Division before the notice was issued. The address on the return lists the same Queens, New York, address as listed on the notice, the request for conciliation conference and the petition, except that petitioners' address on the notice includes an additional four zip code digits added to petitioners' five-digit zip code.

7. The affidavit of Marianna Denier, who has been in her current position since August 2022, and Director of MAPs since July 2022 sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier is the 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. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20202282200." 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 "8/21." In addition, as described by Ms. Denier, generally all pages of the CMR are banded together when the documents are delivered into possession of the 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.

8. 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."

9. The CMR in the present matter consists of 21 cut-sheet pages and lists 267 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Denier 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 August 21, 2020, to each page of the CMR, wrote the number “267” on page 21 next to the preprinted “267” and the heading “Total Pieces and Amounts,” and initialed or signed page 21.

10. Page 10 of the CMR indicates that a notice with certified control number 7104 1002 9735 0069 6419 and reference number L 051622518 was mailed to petitioners at the Queens, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioners’ name and address as noted.

11. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. 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. Each page of the CMR in exhibit “A” of the Denier affidavit contains a USPS postmark of August 21, 2020. On page 21, the

postal service clerk wrote 267 to indicate 267 pieces of mail were received by the USPS. There is a set of initials or a signature on page 21.

12. According to the Denier and Ramundo affidavits, a copy of the notice was mailed to petitioners on August 21, 2020, as claimed.

13. Petitioners filed a response to the Division's motion on January 7, 2023, wherein petitioners argue for the timeliness of their request, among other unsupported claims.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss a petition pursuant to section 3000.9 (a) of the Rules may be granted if the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). The Division's motion addresses the timeliness of petitioners' request for a conciliation conference. Accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of such a request.

B. 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 (Tax Law §§ 681 [b]; 689 [b]). 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]). 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). 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 merits of the protest (*see* Tax Law § 681 [b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. 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] [1]). Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “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 issues 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, 562 [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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], *citing Zuckerman*).

D. Where the timeliness of a petition or request for conciliation conference 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 petitioners' last known address (*see* Tax Law § 681 [a]; *see also 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*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).”

E. The Division has offered sufficient proof to establish the mailing of the statutory notice to petitioners' last known address on August 21, 2020. 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 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). Further, the address on the mailing cover sheet and on the CMR conform with the address listed on petitioners' New York State income tax return for the year 2019, which satisfies the “last known address” requirement in Tax Law § 681 (a).

F. It is concluded that the notice was properly mailed to petitioners on August 21, 2020, 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 commenced on that date (Tax Law §§ 170 [3-a]

[a]; 681 [b]; 689 [b]). Petitioners thus had until November 19, 2020 to file either.

G. The Division has not established that petitioners' request for conciliation conference was untimely. The facsimile cover sheet for petitioners' BCMS request is dated November 17, 2020, and the request itself is signed and dated November 18, 2020, but the request was stamped as received by the Division on January 26, 2021 (*see* finding of fact 2). The Division did not submit any evidence as to the method of filing of the BCMS request. The actual date of the filing of petitioners' BCMS request is an issue of fact, because if the request was made by facsimile on November 17, 2020 or November 18, 2020, then petitioners' request is timely. However, if the request was filed on January 26, 2021, then petitioners' request is untimely. "Since it [summary determination] deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Here, it is clear that the actual date of filing of petitioners' BCMS request is a material issue of fact warranting the denial of the Division's motion for summary determination.

H. Based upon the foregoing, the Division of Taxation's motion for summary determination is denied; this matter will be scheduled for a hearing in due course.

DATED: Albany, New York
April 6, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE