

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
EDWARD MASCARA
for Redetermination of Deficiencies or for Refund of
New York State Personal Income Tax under Article 22
of the Tax Law for the Periods Ended March 31, 2017;
June 30, 2017; June 30, 2018; September 30, 2018;
December 31, 2018; and March 31, 2019.

ORDER
DTA NO. 850264

Petitioner, Edward Mascara,¹ filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the periods ended March 31, 2017; June 30, 2017; June 30, 2018; September 30, 2018; December 31, 2018; and March 31, 2019.

On December 12, 2023, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Stefan M. Armstrong, Esq., of counsel), filed a motion 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) (1) and (b). Petitioner, appearing pro se, filed a response by January 11, 2024, 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, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ Petitioner's name appears as Edward Mascara on the petition and the request for conciliation conference. However, petitioner's name also appears as Edward G. Mascara on other documents in the record, including the notices of deficiency at issue in this matter.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Edward Mascara, at a Monticello, New York, address, 6 notices of deficiency asserting penalty for withholding tax as follows:

Notice Number	Tax Period Ended	Penalty
L-050229024	12/31/18	\$4,030.76
L-050229025	06/30/17	\$5,324.97
L-050229026	09/30/18	\$3,860.42
L-050229027	06/30/18	\$3,206.72
L-050229028	03/31/17	\$4,460.72
L-050229023	03/31/19	\$3,086.32

2. Notices of deficiency L-050229024, L-050229025, L-050229026, L-050229027, and L-050229028 were issued to “MASCARA-EDWARD G,” on July 16, 2019. Notice of deficiency L-050229023 was issued to “MASCARA-EDWARD G,” on August 5, 2019. Each of these 6 notices of deficiency was issued to petitioner because he was determined to be an officer or responsible person of Kaltec Food Packaging, Inc. (Kaltec), who was liable for a penalty equal to the tax that was not paid by the business pursuant to Tax Law § 685 (g).

3. Petitioner filed a request for conciliation conference (request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the 6 notices of deficiency.

The request was signed and dated by petitioner on April 21, 2022. The request was faxed to and received by BCMS on April 21, 2022.

4. On June 17, 2022, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 000340044, to petitioner. The conciliation order determined that petitioner's protest of the subject notices of deficiency 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 notices were issued on July 16, 2019 and August 5, 2019, but the request was not faxed until April 21, 2022, or in excess of 90 days, the request is late filed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on September 15, 2022.

6. To show proof of proper mailing of the notices of deficiency, the Division provided the following with its motion papers: (i) an affirmation, dated November 1, 2023, of Stefan M. Armstrong, Esq., the Division's representative; (ii) two affidavits of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management and Analysis and Project Services Bureau (MAPS), each sworn to on October 4, 2023; (iii) two “CERTIFIED RECORD FOR PRESORT MAIL – ASSESSMENT RECEIVABLE” (CMR), one hand dated July 16, 2019, and the other hand dated August 5, 2019; (iv) copies of the notices of deficiency, dated July 16, 2019, and August 5, 2019, together with the associated mailing cover sheets; (v) two affidavits of Susan Ramundo, a manager in the Division's mail room, one sworn to on October 12, 2023, and the other sworn to on October 4, 2023;² (vi) a copy of petitioner's faxed request for conciliation conference with regard to the 6 notices of deficiency (notices); (vii) a copy of the conciliation order, dated June 17, 2022; and (viii) a copy of petitioner's New York

² The Ramundo affidavit, dated October 12, 2023, describes the mail room procedures followed on July 16, 2019, and the Ramundo affidavit, dated October 4, 2023, describes the mail room procedures followed on August 5, 2019.

State resident income tax return, form IT-201, for the year 2017 (2017 tax return), filed on November 9, 2018, listing the same Monticello, New York, address as is listed on the notices, the request and the petition, except the notices include an additional four zip code digits to petitioner's five-digit zip code.

7. Mr. Armstrong asserts in his affirmation that petitioner's last known address was the Monticello, New York address when the notices were issued.

8. Marianna Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to that position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of deficiency. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavits set forth the Division's general practices and procedures for generating and issuing statutory notices.

9. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. 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 mailing address and the Departmental return address on the front, and the taxpayer assistance information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice,

with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

10. Each batch of statutory notices is accompanied by a CMR, which is generated by CARTS. The CMR lists each notice in the order it is generated in the batch. The certified control number of each notice is listed on the CMR under the heading "CERTIFIED NO." 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 P.O. ADDRESS." The remaining headings list appropriate postage and fees. Each CMR and associated batch of statutory notices are forwarded to the mail room together.

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 after mailing. 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.

11. Susan Ramundo, a manager of the Division's mail room, describes the mail room's general operations and procedures in her affidavits as they relate to statutory notices. Ms. Ramundo has been a manager of the mail room since 2017. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Ramundo's official title is Associate Administrative Analyst, and her duties include managing staff that delivers mail to branch offices of the United States Postal Service (USPS).

12. The mail room receives statutory notices that are ready for mailing in an "Outgoing Certified Mail" area. Each notice in the batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A

member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the windows. The staff member then weighs, seals and places postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail against the information contained on the CMR. Then the clerk performs a random review of up to 30 pieces of certified mail listed on the CMR, by checking those envelopes against the information contained 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.

13. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. 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.

Notice numbers L-050229024, L-050229025, L-050229026, L-050229027 and L-050229028

14. The CMR for the statutory notices allegedly issued by the Division on July 16, 2019 (CMR #1) consists of 24 pages with 256 certified control numbers and corresponding assessment numbers, names, and addresses.³ Each page consists of 11 entries, with the exception of pages 2

³ The CMR originally listed 258 certified control numbers. As noted in findings of fact 19 and 20, the preprinted number 258 appearing next to the heading "TOTAL PIECES AND AMOUNTS" has a slash mark through it, and the handwritten number "256," appears next to "TOTAL PIECES RECEIVED AT POST OFFICE" on the last page of the CMR.

and 7, which contain 10 entries, and page 24, which contains 5 entries. Ms. Denier notes that the copy of CMR #1 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.

15. CMR #1 was produced (printed) approximately 10 days in advance of the anticipated date of the issuance of the notices set forth thereon and listed an initial date (run date) in the upper left corner of each page. That date was expressed as the year, Julian day of the year, and military time of day, in this case, "20191901700." Following the Division's general practice, this date was manually changed on the first and last pages of CMR #1 to "7/16/19." This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 24, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 258 that has a slash mark through it. A USPS employee affixed a postmark, dated July 16, 2019, to pages 1 through 8, and 14 of the CMR. A USPS postmark, bearing an illegible date, is affixed to pages 9 through 12, and 15 through 24 of CMR #1. The handwritten number "256" on page 24 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" is not circled. A USPS employee initialed or signed his or her name next to the USPS postmark on page 24 of CMR #1. As noted, the USPS postmark on page 24 has an illegible date.

16. Page 19 of CMR #1 indicates that five notices with certified control numbers 7104 1002 9730 0390 4219, 7104 1002 9730 0390 4226, 7104 1002 9730 0390 4233, 7104 1002 9730 0390 4240, and 7104 1002 9730 0390 4257 and reference numbers L 050229024, L 050229025, L 050229026, L 050229027, and L 050229028, respectively, were mailed to petitioner at the Monticello, New York, address listed on the notices. The corresponding mailing cover sheets, attached to the Denier affidavit with the copies of the notices as exhibit "B," bear these certified

control numbers and petitioner's name and address as stated above. As noted above, page 19 of CMR #1 bears a USPS postmark, dated July 13, 2019.

17. Ms. Denier alleges that notices of deficiency L-050229024, L-050229025, L-050229026, L-050229027 and L-050229028 were mailed on July 16, 2019, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

18. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on July 16, 2019.

19. Ms. Ramundo alleges that each page of CMR #1 in exhibit "A" of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed on page 24 of the CMR and circled the total number of pieces of certified mail received. On the last page of CMR #1, the preprinted number 258 appearing next to the heading "TOTAL PIECES AND AMOUNTS" has a slash mark through it, and the handwritten number "256" appears to the right of two black scribble marks next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE." As noted above, the handwritten number "256" is not circled. The USPS employee's initials or signature appear next to the illegibly dated USPS postmark on page 24 of the CMR. According to Ms. Ramundo, the number of pieces received was changed from 258 to 256 to reflect that two pieces of certified mail had been "pulled" from the CMR. Ms. Ramundo alleges that the affixation of the postmarks and the USPS employee's initials or signature and circled handwritten number indicate that a total of 256 articles of mail listed on the CMR were delivered to the USPS on July 16, 2019.

20. Ms. Ramundo further explains that a piece of mail may be "pulled" for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pieces of mail "pulled" will be segregated from the remaining group of statutory notices for correction and

issuance at another time. A review of CMR #1 reflects that two pieces of mail were “pulled.” The pieces that were pulled are listed on pages 2 and 7 of the CMR. These pieces of mail had been assigned certified control numbers 7104 1002 9730 0390 2338 and 7104 1002 9730 0390 2895. A line was placed through the entries for these taxpayers after the statutory notices were “pulled.” This deletion is reflected in the change of the total pieces received at the post office on page 24 of the CMR. No such mark is made on or near the listings for petitioner.

21. Based upon her review of the affidavit of Ms. Denier and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Ramundo alleged that on July 16, 2019, an employee of the mail room delivered five pieces of certified mail addressed to petitioner at his Monticello, New York, address in sealed postpaid envelopes to the USPS for delivery by certified mail. She also alleged the CMR delivered to the USPS on July 16, 2019 was returned to the Division.

22. Ms. Ramundo attested that the procedures described in her 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 July 16, 2019.

Notice number L-050229023

23. The CMR for the statutory notices allegedly issued by the Division on August 5, 2019 (CMR #2) consists of 27 pages and lists 295 certified control numbers along with corresponding assessment numbers, names, and addresses. Each page of the CMR contains 11 entries, with the exception of page 27, which includes 9 entries. Ms. Denier notes that the copy of CMR #2 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.

24. CMR #2 was produced (printed) approximately 10 days in advance of the anticipated date of the issuance of the notices set forth thereon and listed an initial date (run date) in the upper left corner of each page. That date was expressed as the year, Julian day of the year, and military time of day, in this case “20192101700.” Following the Division’s general practice, this date was manually changed on the first and last pages of CMR #2 to “8/5/19.” This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 27, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 295. A USPS employee affixed a postmark, dated August 5, 2019, to pages 1, 2, 4, 5, 6, 7, 13, 15, 16, 20, 22, 23, 25, and 26. A USPS postmark, bearing an illegible date, is affixed to pages 3, 8 through 12, 14, 17 through 19, 21, 24, and 27 of CMR #2. A USPS employee wrote “295” on page 27 near the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE.” The USPS employee’s initials or signature appear within the USPS postmark on page 27 of CMR #2. As noted, the USPS postmark on page 27 has an illegible date.

25. Page 19 of the CMR indicates that a notice with certified control number 7104 1002 9730 0405 7969 and reference number L 050229023 was mailed to petitioner at the Monticello, New York, address, listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit “B,” bears this certified control number and petitioner’s name and address as stated above. As noted above, page 19 of CMR #2 bears an illegibly dated USPS postmark.

26. Ms. Denier alleges that notice of deficiency L-050229023 was mailed on August 5, 2019, as indicated by the CMR, as well as the USPS postmark on each page of the CMR.

27. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on August 5, 2019.

28. Ms. Ramundo alleges that each page of CMR #2 in exhibit "A" of the Denier affidavit contains a postmark, and that a USPS employee initialed or signed page 27 of the CMR and wrote the total number of pieces of certified mail received.

29. Based upon her review of the affidavit of Ms. Denier and the exhibits attached thereto, including CMR #2, and her personal knowledge of the procedures of the mail room, Ms. Ramundo alleged that on August 5, 2019, an employee of the mail room delivered a piece of certified mail addressed to petitioner at his Monticello, New York, address in a sealed postpaid envelope to the USPS for delivery by certified mail. She also alleged CMR #2 delivered to the USPS on August 5, 2019 was returned to the Division.

30. Ms. Ramundo attested that the procedures described in her 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 pieces of certified mail on August 5, 2019.

31. Petitioner filed a response to the Division's motion. In his response, petitioner states that Mr. K. Ogwulumba, an employee in the Division's Civil Enforcement section, visited him at his workplace on an unidentified date. During that visit, Mr. Ogwulumba indicated that petitioner was responsible for Kaltec's unpaid taxes. According to petitioner, Mr. Ogwulumba also indicated to him that Kaltec had agreed to a payment plan, negating the immediate need for him to file a request for a conciliation conference. Petitioner, in his response, further states that several months later, Mr. Ogwulumba and another Division employee, a Mrs. Restler, returned to petitioner's workplace to inform him that Kaltec had ceased making payments, and he was again

responsible for the unpaid taxes. Petitioner claims that no one informed him that the responsibility for the unpaid taxes would revert to him if the company failed to make payments. Petitioner further claims that by the time he realized the need for a conciliation conference, he had missed the deadline to file a request for conciliation conference. The remainder of petitioner's response addresses the merits of the petition.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, 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, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This order shall address the instant motion as such.

B. A motion for summary determination "shall be granted if, upon all 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]).

C. 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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). It is not for the court to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]). “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, 382 [2d Dept 1960]).

D. 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 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 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 request for conciliation conference 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 Katz*, Tax Appeals Tribunal,

November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the processes of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Time Bagel*, Tax Appeals Tribunal, September 13, 2012).

G. With respect to notices of deficiency L-050229024, L-050229025, L-050229026, L-050229027, and L-050229028, the Division failed to present sufficient documentary proof, i.e. the CMR, to establish that the subject notices of deficiency were mailed to petitioner at his last known address on July 16, 2019. Specifically, a USPS postmark, dated July 16, 2019, appears on 10 pages of the CMR and illegible USPS postmarks appear on 14 pages of the CMR including page 19, the page on which the subject five notices are listed, and page 24, the last page, where the USPS employee initialed or signed next to the USPS postmark.

H. The Division's proof also fails to establish the mailing of notice of deficiency L-050229023 to petitioner's last known address on August 5, 2019. Illegibly dated postmarks appear on 13 of the 27 pages of the CMR including page 19, the page on which the subject notice of deficiency is listed, and page 27, the last page, where the USPS employee's initials or signature appear within the USPS postmark.

I. The Division of Taxation's motion for summary determination is denied, and a hearing in this matter will be scheduled in due course.

DATED: Albany, New York
April 4, 2024

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE