

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOEL WEINBERGER : **ORDER**
 : **DTA NO. 850488**
 :
for Redetermination of a Deficiency or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2015. :
:

Petitioner, Joel Weinberger, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion dated September 5, 2023, seeking an order of dismissal or, in the alternative, summary determination, in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) (1) (i), (vii) 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 the issuance of this order commenced on October 5, 2023. 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.

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 disallowance.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Joel Weinberger, in protest of a notice of disallowance, dated December 27, 2018, and bearing audit case ID number X-187236903. The notice of disallowance is addressed to: "WEINBERGER-JOEL H" at an address in Brooklyn, New York.

2. Petitioner filed a request with BCMS in protest of the notice of disallowance. The request was faxed to and received by BCMS on January 18, 2023, at 4:40 p.m.

3. On February 3, 2023, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000349689) to petitioner. The conciliation order determined that petitioner's protest of the subject notice of disallowance was untimely and stated, in part:

"The Tax Law requires that a request be filed within 2 years from the date of the statutory notice. Since the notice was issued on December 27, 2018, but the request was not faxed until January 18, 2023, or in excess of 2 years, the request is late filed."

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on March 15, 2023.

5. To show proof of proper mailing of the notice of disallowance, the Division provided the following documents: (i) the affirmation of Maria Matos, an attorney in the Office of Counsel of the Division, dated September 5, 2023; (ii) an affidavit, dated July 25, 2023, of Marianna Denier, a Principal Administrative Analyst and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "CERTIFIED RECORD FOR – DTF-170 Adjusted Refund Denial" (CMR) postmarked December 27, 2018; (iv) a copy of the notice of disallowance, dated December 27, 2018, and the associated mailing cover sheet; (v) an affidavit,

dated July 25, 2023, of Susan Ramundo, a manager in the Division's mail room; (vi) a copy of petitioner's request for conciliation conference and the attachments to same faxed to and received by BCMS on January 18, 2023; (vii) a copy of petitioner's electronically filed form IT-201, resident income tax return for the year 2017 (2017 tax return), filed on June 18, 2018; (viii) a copy of a printout of the e-MPIRE Individual Taxpayer Profile Inquiry for petitioner; and (ix) a copy of petitioner's electronically filed form IT-201, resident income tax return for the year 2011 (2011 tax return), filed on January 25, 2012.

6. Ms. Matos asserts in her affirmation that petitioner's 2017 tax return was electronically filed on June 9, 2018 (the 2017 tax return bears the preparation date of June 18, 2018), and that this was the last return filed before the Division issued the notice of disallowance. Ms. Matos further asserts that "[e]xcept for specifying the apartment number for Petitioner on the Notice, the address on the subject Notice is the same address appearing" on the 2017 tax return.

7. Attachment 6 to Ms. Matos' affirmation is a copy of a printout of the e-MPIRE Individual Taxpayer Profile Inquiry for petitioner. Also attached to Ms. Matos' affirmation is a copy of petitioner's 2011 tax return that Ms. Matos asserts was electronically filed on January 25, 2012.

8. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier has been the Director of MAPS since July 2022 and a Principal Administrative Analyst since August 2022. She was a Supervisor of Administrative Analysis from July 2019 through August 2022. Ms. Denier began working for the Division in February 1986 and has been a supervisor in MAPS since October 2004. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms.

Denier 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. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of the issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20183480635." 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 "12/27/18." In addition, as described by Ms. Denier, generally all pages of the CMR are banded together when the documents are delivered into the 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.

9. Notices of deficiency, notices of determination, notices of estimated determination and other statutory notices are electronically generated from CARTS and are predated with the anticipated date of mailing. 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 the 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."

10. The CMR in the present matter consists of 73 pages and lists 1,047 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 13 to 15 such entries, with the exception of page 73, which includes zero entries. Ms. Denier notes that the copy of the CMR 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 employee initialed and affixed a postmark dated December 27, 2018 to each page of the CMR, wrote and circled "1047" on page 73 near the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," and signed or initialed the last page of the CMR.

11. Page 33 of the CMR lists certified control number 7104 1002 9735 4609 6365, reference number 181221750616 00, and petitioner's name and address.

12. Ms. Denier, in her affidavit, asserts that:

"[a]ttached hereto as Exhibit 'B' is a true and accurate copy of the Notice of Disallowance mailed to petitioner on December 27, 2018, along with the associated Mailing Cover Sheet. A review of Exhibit 'B' shows that the document bears assessment identification number of '181221750616' and the certified control number of '7104 1002 9735 4609 6365.' The foregoing numbers are identical to the assessment identification and certified control number that appears next to the entry for the petitioner on [the CMR]."

13. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on December 27, 2018.

14. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail room staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a 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 statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage, and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information listed on the CMR, and then performs a random review of up to 30 pieces 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. 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 by writing the number on the CMR. As noted, each of the 73 pages of the CMR attached to the Denier affidavit as exhibit "A" contains the initials of the USPS employee and a USPS postmark of December 27, 2018. On page 73, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 1,047 and near "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten circled entry "1047," indicating 1,047 pieces of mail were received by the USPS. There is a set of initials or signature on page 73.

15. 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.

16. Both the Denier and Ramundo affidavits allege that a copy of the notice of disallowance was properly mailed to petitioner at his Brooklyn, New York, address on December 27, 2018.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) (i) and (vii) 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 subject matter jurisdiction over the issue of the timely filing of a request for conciliation conference. Therefore, the Division's motion will be treated as one for summary determination (*see Matter of Panco Equip. Corp.*, Tax Appeals Tribunal, May 24, 2021).

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, Inc. 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 notice of disallowance may be challenged by the filing of either a petition with the Division of Tax Appeals or a request for conciliation conference with BCMS within two years after the issuance of the notice of disallowance (*see* Tax Law §§ 689 [c]; 170 [3-a] [a]).

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. Here, the Division failed to produce any evidence of its standard procedure for the issuance of notices of disallowance. In addition, the Division also failed to prove that such standard procedure was followed in the issuance of the notice of disallowance to petitioner at his last known address. As such, the Division’s motion for summary determination must be denied.

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

DATED: Albany, New York
December 21, 2023

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE