

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JACQUELINE GUZMAN : ORDER
 : DTA NO. 821596
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax :
Law for the Year 2003. :

Petitioner, Jacqueline Guzman, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2003.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed August 6, 2007, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i); (b). Petitioner, appearing pro se, did not submit any response to the Division's motion, although permitted to do so by September 5, 2007. Thus, the 90-day period for issuance of this determination began on September 5, 2007. After due consideration of the documents and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Jacqueline Guzman, a Notice of Disallowance, dated July 23, 2004, addressed to petitioner at 367 South 2nd Street, Apt 6F, Brooklyn, New York 11211. The notice disallowed petitioner’s claim for refund in the amount of \$1,298.00 for the year 2003. The notice further advised petitioner that should she disagree with the notice, she had two years from the date of the notice to either request a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) or petition for a Tax Appeals Hearing with the Division of Tax Appeals.

2. On October 6, 2004, petitioner wrote to the Division as follows:

On 6/16/04, you sent me a letter stating that my requested refund cannot be allowed, as the income could not be verified as being paid. Following that, on 6/24/04, I sent you a respond [*sic*] letter stating that I was not in agreement with your decision, as I called your office and spoke with one of your representatives, and he told me that the reason for your decision was because you have no record of the estimated income tax payments I sent to your office.

In additional response to your letter, attached please find copies of the canceled money orders sent to you, one on 10/28/03; which was cashed by your office on 11/03/2003, and the second payment was sent to you on 12/22/03; and the same was cashed by your office on 12/26/2003.

Please revise your records, reconsider your decision and send me my allowed refund as soon as possible. If you need any additional, [*sic*] do not hesitate to let me know at your best convenience.

3. On November 27, 2006, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”), protesting a notice dated October 22, 2004.

4. On December 22, 2006, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on July 23, 2004, but the request was not mailed until November 27, 2006, or in excess of 90 days, the request is late filed.

5. On March 6, 2007, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated December 22, 2006.

CONCLUSIONS OF LAW

A. 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 that 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to section 3212 of the CPLR. “The proponent of summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317 [1985] citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1985]). Inasmuch 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, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [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, 206 NYS2d 879, 881 [1960]). “To defeat a motion for summary judgment, the opponent must

also produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173, citing *Zuckerman v. City of New York*, *supra*).

C. Tax Law § 689(c)(3) provides that a taxpayer may file a petition for the amounts asserted in a claim for refund where the Division has mailed to the taxpayer a notice of disallowance of such claim. No petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance.

D. Petitioner had two years from the date of the issuance of the Notice of Disallowance of her refund claim to file a petition with the Division of Tax Appeals or to request a conciliation conference in BCMS seeking revision of the disallowance (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conciliation conference within the two-year period is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

E. Where the taxpayer files a petition or request for conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice of disallowance (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices 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 (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. The Division failed to introduce any proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures and failed to introduce any proof that the standard procedure was followed in the particular instance in question. Instead, the Division states that petitioner's letter of October 6, 2004 (*see, Finding of Fact "2"*) is an acknowledgment by petitioner of receipt of the Notice of Disallowance dated July 23, 2004. Unfortunately for the Division's position, a careful reading of petitioner's letter of October 6, 2004 reveals that petitioner acknowledged receipt of the Division's letter of June 16, 2004, and not the Notice of Disallowance dated July 23, 2004.

Under these circumstances, it must be held that the Division has failed to meet its burden of establishing the proper mailing of the Notice of Disallowance.

G. The Division of Taxation's motion for summary determination or dismissal is denied. The matter will be scheduled for a hearing limited to the issue of the timeliness of petitioner's request for a conciliation conference.

DATED: Troy, New York
November 1, 2007

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE