

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEANDRO CAMPOS-LIZ	:	DECISION
	:	DTA NO. 826984
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2012.	:	

Petitioner, Leandro Campos-Liz, filed an exception to the determination of the Administrative Law Judge issued on January 7, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. No request for oral argument was made. The six-month period for issuance of this decision began on July 14, 2016, the date that the reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a conciliation order denying his refund claim.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have modified findings of fact 2 and 4 to more clearly reflect the record, made a new finding of fact

number 5 and renumbered all subsequent findings of fact for clarity. These facts are set forth below.

1. On May 26, 2015, petitioner, Leandro Campos-Liz, filed a petition with the Division of Tax Appeals. The petition was filed in protest of a conciliation order (CMS number 261502), issued by the Bureau of Conciliation and Mediation Services (BCMS) on December 26, 2014.

2. On August 7, 2015, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioner. The notice of intent indicates that the relevant conciliation order was issued on December 26, 2014, but that the petition was not filed until May 26, 2015, or 151 days later.

3. In response to the issuance of the notice of intent to dismiss petition, the Division of Taxation (Division) submitted, among other documents, (i) the affidavit of Christopher O'Brien, an attorney employed in the Office of Counsel of the Division, dated October 19, 2015; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated October 14, 2015; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked December 26, 2014; (iv) a copy of the conciliation order, cover letter and cover sheet, dated December 26, 2014, and copy of the three-windowed mailing envelope; (v) an affidavit, dated October 15, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; and (vi) petitioner's request for conciliation conference, received by BCMS on April 8, 2014, wherein petitioner requested that the conference be conducted by telephone.

4. The affidavit of Christopher O'Brien, attorney in the Office of Counsel of the Division, attests that his review of the Division's records revealed that during the conciliation conference, which was conducted via teleconference, petitioner told the conciliation conferee that his current address was 101 Palm Harbor Pkwy, Palm Coast, Florida. This address appears on the

conciliation order cover letter, cover sheet and CMR for petitioner's entry. Petitioner does not dispute that this was his last known address at the time of the issuance of the conciliation order.

5. The return address petitioner listed on his request for a conciliation conference is the same Bronx, New York return address as that listed on an amended 2012 New York personal income tax return and his petition to the Division of Tax Appeals. That same Bronx, New York address is the address to which the Division addressed its partial refund denial dated August 13, 2013.

6. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

7. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

8. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified mail control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified mail control number, and certified mail control number bar code.

9. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a

particular day. The certified control numbers are recorded on the CMR under the heading “Certified No.” The BCMS numbers are recorded on the CMR under the heading “Reference No.” and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers’ representatives with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

11. The “Total Pieces and Amounts” is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

12. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case “12/26/14” is written in the upper right corner of each page of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of December 26, 2014.

13. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, is picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the seven-page CMR

relevant to this matter, which contains a list of the conciliation orders issued by the Division on December 26, 2014. This CMR lists 69 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number, and the name and address of the addressees. There are no deletions from the list. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

15. Information regarding the conciliation order issued to petitioner is contained on page six of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0336 7823 is reference/CMS number 000261502, along with petitioner's name and a Palm Coast, Florida, address. The cover sheet bears petitioner's name and the same Palm Coast, Florida, address that appears on the CMR and shows the same certified control number, 7104 1002 9730 0336 7823, as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

16. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark

and his or her initials or signature to the CMR indicating receipt by the post office.

17. In this particular instance, the postal employee affixed a postmark dated December 26, 2014 to and also wrote his or her signature or initials on each page of the seven-page CMR. The postal employee also circled the preprinted number "69" corresponding to the heading "Total Pieces and Amounts." The circling of the Total Pieces and Amounts number was done at the Division's specific request and is intended to indicate that all 69 pieces of mail listed in the CMR were received at the post office.

18. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on December 26, 2014, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his Palm Coast, Florida, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on December 26, 2014 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner on December 26, 2014.

20. Petitioner's response to the notice of intent to dismiss does not dispute that the petition was filed more than 90 days after the issuance of the conciliation order and does not dispute that the conciliation order was mailed to his last known address.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge cited the relevant statutes and case law for determining whether a taxpayer's petition was filed timely. She explained that a taxpayer's failure to file a petition within the statutorily-defined period results in lack of jurisdiction for the Division of Tax Appeals to consider the merits of the taxpayer's protest and noted that such a period of limitation is strictly enforced. She observed that petitioner's filing of his petition with the Division of Tax Appeals appeared to be beyond this 90-day limitations period, which resulted in the issuance of the notice of intent to dismiss his petition.

The Administrative Law Judge set forth the initial inquiry for determining whether the Division had met its burden of demonstrating proper mailing of the conciliation order, thereby commencing the 90-day limitation period. In order to demonstrate proper mailing, the Division must prove that there is a standard procedure in place for issuance of statutory notices and offer proof that such a procedure was followed in issuing the statutory notice to petitioner in this particular case. The Administrative Law Judge concluded that the CMR, conciliation order cover sheet and cover letter, and affidavits from Mr. Farrelly and Mr. Peltier established the standard mailing procedure while the completed CMR demonstrated the date and fact of the mailing of the subject statutory notice. She found that there was no evidence that petitioner updated his mailing address with BCMS after the conciliation conference and before issuance of the conciliation order, thus concluding that the conciliation order was properly addressed. She noted that petitioner did not dispute that the conciliation order was sent to the correct address. As the 90-

day limitations period for the filing of a petition began on December 26, 2014, the Administrative Law Judge determined that the petition in this matter, filed on May 26, 2015, was untimely as it was filed 151 days after issuance of the statutory notice. The Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioner's protest and dismissed his petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Division has not fully considered the evidence he submitted in support of his refund claim. He states that he is entitled to his claimed refund because he was a part-year resident of New York in 2012 while living with his infant son and therefore meets the qualifications for the New York earned income tax credit.

The Division maintains that petitioner did not file his petition with the Division of Tax Appeals within the 90-day period following issuance of the conciliation order. Thus, the Division argues, the Division of Tax Appeals lacks jurisdiction to hear petitioner's protest. The Division posits that it has demonstrated proper mailing procedure and the fact that such procedure was followed in petitioner's case. The Division urges this Tribunal to affirm the determination of the Administrative Law Judge and deny petitioner's exception for lack of jurisdiction over the subject matter of his petition.

OPINION

The Administrative Law Judge's determination in this matter followed the Division of Tax Appeals' issuance of a notice of intent to dismiss pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). We have held that the standard of review for a notice of intent to dismiss is the same as that for a motion for summary determination (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Our

Rules provide that a summary determination motion “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 our Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant for summary determination “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 [1980]). As we noted in *Matter of United Water New York*:

“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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, 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 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of 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 [1992], quoting *Zuckerman*). Regardless of the sufficiency of the opposing papers, however, the failure of the proponent of the motion to make a prima facie showing of entitlement to judgement as a matter of law requires denial of the motion (*Winegrad*, at 853).

The Administrative Law Judge correctly stated that where timeliness of filing of a protest is at issue, the initial inquiry is determining whether the Division has met its burden of showing the date and fact of mailing of the statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of its standard mailing procedure and proof that such procedure was followed in that particular instance in order to meet its burden of proving proper mailing (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). As we held in *Katz*, proper mailing of the statutory notice includes the fact of mailing to the taxpayer's last known address (*id.*, *see also Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Thus, in order to prevail on the motion at issue here, the Division bears the burden of showing that the statutory notice was sent to the taxpayer's last known address as part of its proof that it followed its own mailing procedures in this case.

Terms under Article 22 of the Tax Law are given the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required (Tax Law § 607 [a]). Here, where the effect of a statutory notice conferring protest rights is at issue, it is appropriate to refer to federal case law and statutes regarding issuance of analogous statutory notices to clarify the meaning of the term "last known address."

The last known address of a taxpayer has been defined for federal purposes as the taxpayer's last permanent address or legal residence known by the Internal Revenue Service (IRS) or the last known temporary address of a definite duration to which the taxpayer has

directed the IRS to send all communications (*see Alta Sierra Vista, Inc. v Commr. of Internal Revenue*, 62 TC 367, 374 [1974], *affd sub nom. Alta Sierra Vista, Inc. v C. I. R.*, 538 F.2d 334 [1976]). Generally, the last known address will be the address listed on the taxpayer's last tax return filed with the IRS, unless there is "clear and concise notification" by the taxpayer of a change of address (*id.*, *see also Weinroth v Commr. of Internal Revenue*, 74 TC 430, 435 [1980]). The last known address of a particular taxpayer is the address to which, in light of all the surrounding facts and circumstances, the IRS reasonably believed the taxpayer wished the notice to be sent (*id.*, *cf. Looper v Commr.*, 73 TC 690 [1980], concluding that the IRS' designation of a temporary address as the taxpayer's last known address was unreasonable in light of the circumstances).

The Division's attorney avers in his affidavit in support of the notice of intent to dismiss petition that based on his review of the Division's files, petitioner informed the conciliation conferee that a Palm Coast, Florida mailing address was his new mailing address. However, we find that it is impossible to determine from the Division's affidavits and exhibits whether, in light of the surrounding facts and circumstances, petitioner's notification of a new address was clear and concise where no further support is offered regarding that notification of an address change. In this case, the Division's recitation of a proposed fact, without additional information as to its source and considering that petitioner continued to use his Bronx, New York address, fails to meet the exacting standard demanded of proponents of an accelerated determination (*see* 20 NYCRR 3000.9 [b]; CPLR § 3212). Without any additional evidence establishing that petitioner clearly and concisely requested the Division to send him notices at the Palm Coast, Florida address, we find that there is insufficient support in the record to conclude that proper mailing of the statutory notice was completed in this instance, especially where petitioner used the Bronx,

New York mailing address both prior to and subsequent to the conciliation conference (*see* finding of fact 5).

As noted above, the Division bears the burden of showing proper mailing of a statutory notice, including the general office procedure and fact of mailing, where it seeks accelerated determination for lack of subject matter jurisdiction due to a late-filed petition. Where the Division has not borne its burden of eliminating any material and triable fact through its response to a notice of intent to dismiss petition, it is appropriate to withdraw such notice of intent. We therefore withdraw the August 7, 2015 notice of intent to dismiss petition without prejudice to any subsequent motion to dismiss under 3000.9 of our Rules (20 NYCRR 3000.9 [a]) or any subsequent hearing on the issue of timeliness. We thus remand this matter to the Administrative Law Judge for further proceedings on the issue of timeliness consistent with this decision and ultimately, if determined to be appropriate, a determination on the merits. Pursuant to 3000.4 of our Rules (20 NYCRR 3000.4 [b]), the Division shall have 75 days from the date of this decision to file its answer in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leandro Campos-Liz is granted to the extent indicated in paragraphs 2 and 3 below;
2. The determination of the Administrative Law Judge is reversed;
3. The August 7, 2015 notice of intent to dismiss petition is withdrawn without prejudice; and

4. The matter is remanded to the Administrative Law Judge for further proceedings on the issue of timeliness of the petition consistent with this decision and, if determined to be appropriate, a determination on the merits.

DATED: Albany, New York
January 12, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner