

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

FRANK O. ZIMMERMANN :

DECISION
DTA NO. 828930

for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes Under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2014.

Petitioner, Frank O. Zimmermann, filed an exception to the determination of the Administrative Law Judge issued on December 12, 2019. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for issuance of this decision began on June 10, 2020, the date that petitioner's reply letter brief was received.

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

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 deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The subject of present matter is the timeliness of petitioner's protest of a notice of deficiency, dated November 30, 2017, and bearing assessment identification number L-046612508 (notice). The notice is addressed to petitioner, Frank O. Zimmermann, at an address in Brooklyn, New York.

2. Petitioner filed a request for conciliation conference with the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was faxed by petitioner to BCMS on July 11, 2018.

3. On August 3, 2018, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's 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 November 30, 2017, but the request was not faxed until July 11, 2018, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on October 9, 2018. In his petition, petitioner states that he faxed a request for conciliation conference to BCMS on May 8, 2018 and that, after receiving a tax warrant, dated June 21, 2018, for the notice, he re-faxed the request for conciliation conference on July 11, 2018. Petitioner did not present any evidence substantiating his allegation that he faxed a request for conciliation conference to BCMS on May 8, 2018, or any other date prior to July 11, 2018.

5. On December 19, 2018, the Division filed its answer to the petition affirmatively alleging, among other things, that a notice of deficiency was issued to petitioner on November 30, 2017; that BCMS received a request for conciliation conference on July 11, 2018, more than

90 days after the notice was issued; and that the Division of Tax Appeals lacks jurisdiction to review the merits of the late-filed petition.

6. On February 21, 2019, the Division filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) (1) (i) and 3000.9 (b) on the ground that the petition was untimely. Petitioner, appearing pro se, responded by letter brief dated March 26, 2019. By order dated June 20, 2019, the Division's motion to dismiss the petition or for summary determination was denied without prejudice.

7. The Division brought a subsequent motion for summary determination on July 3, 2019. To show proof of proper mailing of the notice on this second motion, the Division provided the following with its motion papers: (i) an affidavit, dated November 30, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting 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 November 30, 2017; (iii) an affidavit, dated November 30, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) an affidavit, dated June 28, 2019, of Mark Ruddy, business service network representative in the Albany District of the United States Postal Service (USPS); (v) a copy of the November 30, 2017, notice with the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference, faxed to BCMS on July 11, 2018; and (vii) a copy of petitioner's 2016 form IT-201, New York State resident income tax return, filed on May 30, 2017, which lists the same Brooklyn, New York, address for petitioner as that listed on the

notice, the request for conciliation conference and the petition. The 2016 income tax return was the last return filed with the Division by petitioner before the notice was issued.

8. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 (the "run" date) in the upper left margin. Each page of the CMR lists a run date that is approximately 10 days in advance of the anticipated date of mailing. 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 "11/30/17." In addition, as described by Ms. Picard, 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.

9. 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.”

10. The CMR in the present matter consists of 343 pages and lists 5,034 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 12 to 15 such entries, with the exception of page 343, which includes 7 entries. Ms. Picard 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.

11. Except as noted, each page of the CMR bears a USPS postmark of “GMF Albany NY 12212,” with a date of November 30, 2017. Pages 1, 2 and 4 bear the aforesaid postmark, along with a second postmark of “Albany GMF 12288,” also with a November 30, 2017 date. Page 3 bears only a postmark of “Albany GMF 12288,” with a November 30, 2017 date. The page numbers shown on the right margin of the first four pages of the CMR are consistent with the rest of the CMR and the first four pages show the same “run” date on the upper left margin as the rest of the CMR.

12. A USPS representative wrote the number “5034” on page 343 next to the heading “Total Pieces and Amounts” and initialed page 343.

13. Page 130 of the CMR indicates that a notice with certified control number 7104 1002 9735 3985 7805 and reference number L-046612508 was mailed to petitioner at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this same certified control number and petitioner’s name and address as noted.

14. The affidavit of Fred Ramundo describes the general operations and procedures of the Division's mail room. Mr. Ramundo has been in his position since 2013 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. Mr. 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. The mail room further 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. According to Mr. Ramundo, the affixation of the USPS postmark on each page of the CMR and the USPS employee's writing "5034" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 5,034 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on November 30, 2017.

15. According to both the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on November 30, 2017, as claimed.

16. Mr. Ruddy's affidavit seeks to explain the discrepancy in the postmarks on the first four pages of the CMR (*see* finding of fact 11). His affidavit notes that he has worked at the United States postal processing center located at 30 Old Karner Road, Albany, NY 12288 for the last four years. According to the affidavit, the 30 Old Karner Road facility is a "general mail facility" (GMF). It is the only GMF in the entire Albany area. The facility has two sections under one roof, a processing center, and the carrier section and retail front counter. Each section has its own designation zip code to delineate the individual sections within the same building. The retail front counter has a designation zip code of 12212, while the processing section has a designation zip code of 12288. Each section has its own date stamp with the corresponding designation zip code, but both stamps contain the letters "GMF Albany" or "Albany GMF" because they are both part of the same GMF. The postal clerks are required to stamp each piece of mail with a legible postmark that indicates the date received and location of the mail facility. But "late in 2017," some of the stamps were becoming worn out so new stamps were on order. In the interim, since the postmark imprint must be legible, "it was necessary for postal clerks to borrow or interchange the stamps for their postmarking activities during this time so they used both stamps bearing 12212 and 12288 to get the postmarks finalized." The affidavit further explains that, given that the CMR in this case was processed during the holiday season, when the mail flow at the facility is much greater, the facility did not have enough of the 12288 processing stamps, so the retail stamps bearing the zip code 12212 were also used to stamp incoming mail. The affidavit concludes as follows:

"Whether the stamp bore the zip code 12212 or 12288 it meant it was received at the same GMF in Albany NY. The zip codes 12212 and 12288 are not used at any other facility other than at the one GMF in Albany New York. Since both stamps are from the same GMF, the stamps were used interchangeably as either

stamp indicates that mail was received at the same GMF located at 30 Old Karner Road in Albany, New York on the date indicated on the stamp.”

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division of Tax Appeals has jurisdiction over the petition because it was filed within 90 days of the date of the conciliation order and, accordingly, he determined that a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal was the proper vehicle to consider the issue of whether petitioner timely filed his request for conciliation conference. The Administrative Law Judge then noted that the proponent of a motion for summary determination must make a prima facie showing of entitlement to judgment as a matter of law and that the opponent of such a motion must produce evidentiary proof in admissible form demonstrating material questions of fact requiring a trial.

Next, the Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition for hearing or request for conciliation conference following the issuance of a notice of deficiency and that the Division of Tax Appeals lacks jurisdiction to consider the merits of a protest filed beyond the 90-day statutory limit. The Administrative Law Judge observed that where the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing of the notice to petitioner’s last known address. The Administrative Law Judge found that, in order to do so, the Division must show proof of a standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division offered sufficient proof to establish that the notice was properly mailed to petitioner's last known address on November 30, 2017. The Administrative Law Judge found that the Division proved its standard mailing procedure through the affidavits submitted by Ms. Picard and Mr. Ramundo. The Administrative Law Judge also concluded that those affidavits, along with the properly completed CMR, showed that such procedure was followed in this specific case. The Administrative Law Judge determined that the presence of conflicting postmarks on the first four pages of the CMR was adequately explained through the affidavit of Mark Ruddy, a representative of the USPS in the Albany district, and did not raise a question of fact requiring a hearing. The Administrative Law Judge concluded that the statutory notice was properly mailed to petitioner's last known address; that is, the address listed on petitioner's 2016 New York income tax return. Accordingly, based on the issuance date of the notice and the filing date of the request for conciliation conference, the Administrative Law Judge found that petitioner's conference request was untimely.

The Administrative Law Judge observed that petitioner did not challenge the USPS employee's explanation for the conflicting postmarks or whether the Division properly mailed the subject notice but, rather, argued that he was not aware of the notice and that he had never received it. The Administrative Law Judge observed that the Tax Law does not require actual receipt of a properly mailed notice of deficiency of income tax and granted the Division's motion for summary determination.

ARGUMENTS ON EXCEPTION

On exception, as he did in the proceeding below, petitioner argues that he never received the notice of deficiency and that he should not be penalized for something that was not in his control. He contends that although the Division has carried its burden of demonstrating proper mailing of the notice, it has not established that the notice actually left the Albany post office or that it was delivered to his address. Petitioner asserts that the Division was unable to produce a certified mail receipt and, without one, there is no explanation as to how petitioner could have responded to the notice in a timely manner. He argues that he responded immediately after receiving a tax warrant.

The Division argues that the Administrative Law Judge correctly determined that the Division carried its burden of demonstrating proper mailing of the statutory notice by certified mail to petitioner's last known address on November 30, 2017. It contends that the CMR was properly completed and constitutes highly probative documentary evidence of both the fact and date of mailing of the statutory notice to petitioner's last known address. It argues that the affidavit of USPS employee, Mark Ruddy, clearly establishes that the entire CMR was brought to the USPS facility at 30 Old Karner Road, which is the only general mail facility in the Albany area, despite the fact that different stamps were used to stamp certain pages of the CMR. The Division argues that where, as here, a notice of deficiency of income tax has been properly mailed, the Tax Law does not require actual receipt by the taxpayer. The Division contends that petitioner has failed to come forward with any evidence beyond his assertion that he had no knowledge of the notice.

OPINION

We affirm the determination of the Administrative Law Judge.

Preliminarily, we note that the petition in this matter was filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation order dismissing petitioner's request for conciliation conference and, as such, we concur with the Administrative Law Judge that the Division of Tax Appeals has jurisdiction over the petition (*see* Tax Law §§ 170 [3-a] [a], [e] and 2006 [4]; *Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991). We also agree with the Administrative Law Judge that where the Division of Tax Appeals has jurisdiction over a petition, summary determination is the proper vehicle to consider the issue of whether petitioner timely filed his request for conciliation conference (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

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]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212 (20 NYCRR 3000.9 [c]). "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 a material issue of fact is

arguable (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004). 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 (*see Gerard v Inglese*, 11 AD2d 381 [2d Dept 1960]). “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 v City of New York* 49 NY2d at 562).

Tax Law § 681 (a) authorizes the Division to mail a notice of deficiency by certified or registered mail to the taxpayer at his last known address, if it determines that there is a deficiency of income tax. 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 by filing a request for 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 conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of Am. Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003). 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).

The Administrative Law Judge correctly noted that where timeliness of the filing of a

protest is at issue, the initial inquiry is determining whether the Division has met its burden of showing the fact and date 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., Inc.*). Actual receipt of the notice is unnecessary; if it is mailed to the taxpayer's last known address, that is adequate for the purposes of the statute (*see Matter of Oberlander*, Tax Appeals Tribunal, August 24, 2020; *Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

Here, we agree with the Administrative Law Judge's determination that the Division's proof establishes that the subject notice was mailed to petitioner's last known address on November 30, 2017. Specifically, we find that the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency during the period at issue. We also agree that the CMR was properly completed and, together with the proof of the Division's standard mailing procedure, constitutes highly probative evidence of both the fact and date of mailing of the subject notice (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015; *see also Matter of Western Aries Constr.*,

LLC, Tax Appeals Tribunal, March 3, 2011). Specifically, as noted by the Administrative Law Judge, the CMR lists the certified mail control number and petitioner's name and his address on page 130 and all 5,034 certified articles covered by the CMR were delivered into the possession of the USPS on November 30, 2017, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote "5034" on that last page and initialed the page. Further, the address on the mailing cover sheet and the CMR entry is the same as the address listed on petitioner's 2016 New York resident income tax return. This satisfies the last known address requirement of the statute (*see* Tax Law § 691 [b]).

We also agree with the Administrative Law Judge's conclusion that the discrepancy in the postmarks stamped on the first four pages of the CMR (*see* finding of fact 11) has been adequately addressed and does not raise a question of fact as to whether the Division's standard mailing procedure was followed in this case. In a sworn affidavit, Mark Ruddy, Business Service Network Representative in the Albany District of the USPS, clarified that the only postal facility using the "Albany GMF 12288" and the "GMF ALBANY NY 12212" postmarks is the postal facility at 30 Old Karner Road, which is the only general mail facility in the Albany area and the facility where the Division mailed the subject notice (*see* finding of fact 16).

The Division thus properly mailed the notice at issue to petitioner on November 30, 2017 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]). Petitioner's request for conciliation conference, filed on July 11, 2018, was therefore untimely and properly dismissed by BCMS. In the proceeding below, petitioner alleged, but did not substantiate, that he originally submitted his request for conciliation

conference on May 8, 2018. We note that such date is also beyond the 90-day statutory time limit for filing a request for conciliation conference or a petition with the Division of Tax Appeals.

Here, petitioner does not contest that the Division properly mailed the notice to his address; rather, he merely asserts that he did not receive it and should not be penalized for something that was not in his control. He argues that the Division has not established that the notice ever left the Albany post office or that it was delivered to his address. We have considered this argument; however, we must reject it because where, as here, a notice of deficiency of income tax has been properly mailed, actual receipt by the taxpayer is not required. Indeed, this Tribunal has found that a properly mailed notice of deficiency is “valid and sufficient whether or not actually received” (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *see also Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Carotenuto*, Tax Appeals Tribunal, March 17, 2016). “[T]he statute [thus] places the risk of nondelivery on the taxpayer” (*Matter of Malpica*). Thus, petitioner’s failure to receive the subject notice is “immaterial” (*Matter of Kenning v Department of Taxation & Fin.*, 72 Misc 2d 929, 930 [Sup Ct Albany Cty 1972], *affd* 43 AD2d 815 [3rd Dept 1973], *appeal dismissed* 34 NY2d 667 [1974]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frank O. Zimmermann is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Frank O. Zimmermann is denied; and
4. The conciliation order dismissing request, dated August 3, 2018, is sustained.

DATED: Albany, New York
November 5, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner