

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
EMILIA KOWALEWICZ : DECISION :
 : DTA NO. 850414 :
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 2021. :
:

Petitioner, Emilia Kowalewicz, filed an exception to the determination of the Administrative Law Judge issued on November 30, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on March 4, 2024, the date that petitioner’s reply brief was due.

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

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 deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact numbered 1, 2, and 5, which we have modified. We have also added an additional finding of

fact, numbered 14 herein to reflect the record more fully. As so modified, the Administrative Law Judge's findings of fact and the additional finding of fact appear below.

1. The Division of Taxation (Division) brought a motion, dated September 5, 2023, 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) and (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules). The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated June 15, 2022, and bearing assessment identification number L-055823713. The notice was addressed to petitioner at an address in Santa Monica, California. The mailing cover sheet of the notice contains certified control number 7104 1002 9735 1855 8600.

2. Petitioner, Emilia Kowalewicz, filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice of deficiency dated June 15, 2022, that asserted additional tax due of \$437.83 for the year 2021. The request was signed by petitioner and dated January 6, 2023.

3. On January 27, 2023, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000349051) to petitioner. The conciliation order determined that petitioner's protest of the subject 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 June 15, 2022, but the request was not faxed until January 6, 2023, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on February 13, 2023.

5. To show proof of proper mailing of the notice, the Division provided the following

with its motion papers: (i) an affirmation, dated September 5, 2023, of Colleen McMahon, Esq., the Division's representative; (ii) an affidavit, dated May 19, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management and Analysis and Project Services Bureau (MAPS); (iii) a certified mail record (CMR) entitled "Certified Record for – DTF-962-F-E – Not of Def Follow Up DTF-963-E- Notice of Determination DTF-963-F-E – Not of Det Follow Up" (CMR) postmarked June 15, 2022; (iv) a copy of the notice of deficiency, dated June 15, 2022, with its associated mailing cover sheet; (v) an affidavit, dated May 23, 2023, of Susan Ramundo, a manager in the Division's mail room; (vi) a copy of petitioner's request for conciliation conference, with attachments; (vii) a copy of the conciliation order, dated January 27, 2023; (viii) a copy of the petition filed on February 13, 2023; and (ix) a copy of petitioner's electronically filed form IT-203, nonresident and part-year resident income tax return for the year 2021 (2021 tax return). The Santa Monica, California address listed on the 2021 tax return is the same address as listed on the notice, the request for conciliation conference and the petition, except that petitioner's address on the 2021 tax return and the notice include an additional four zip code digits to petitioner's five-digit zip code. The 2021 tax return was the last return filed with the Division by petitioner before the notice was issued.

6. 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 the Division's Management Analysis and Project Services Bureau (MAPS) since July 2022 and a Principal Administrative Analyst since 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. The date is expressed as the year, Julian day of the year, and military time of day, in this case “20221600635.” Following the Division’s general practice, this date was manually changed on the first and the last pages of the CMR in the present case to “6/15/22.” 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.

7. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number for each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the recipient’s mailing address and a departmental return address on the front and taxpayer assistance information on the back. The certified control number is 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 THE ADDRESSEE, STREET, AND P.O. ADDRESS.”

8. The CMR in the present matter consists of 166 pages and lists 2,202 certified control numbers along with corresponding assessment numbers, names, and addresses. Each of the pages consists of 11 to 15 entries except for page 166, which consists of eight entries. Ms.

Denier 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. A USPS employee affixed a postmark dated June 15, 2022 to each page of the CMR, wrote “2,202” on page 166 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and signed or initialed the last page of the CMR.

9. Page 163 of the CMR indicates that a notice with certified control number 7104 1002 9735 1855 8600, and reference number L-055823713 was mailed to “KOWALEWICZ-EMILIA” at the Santa Monica, California, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit with the notice as exhibit “B,” bears this certified control number, petitioner’s name and her address as stated above.

10. 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 mailroom and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet, is accompanied by any required enclosures and each batch includes its accompanying CMR. A staff member receives the notices and the associated documents and operates a machine that puts each notice and mailing cover sheet in 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 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 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 writes his or her initials or signature on the CMR, indicating receipt of the mail listed on the CMR and the CMR itself 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. As noted, each of the 166 pages of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark of June 15, 2022. On page 166, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 2,202 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "2,202" indicating 2,202 pieces of mail were received by the USPS. There is a set of initials or signature on page 166.

11. 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.

12. According to the Denier and Ramundo affidavits, a copy of the notice was properly mailed to petitioner at her Santa Monica, California, address on June 15, 2022, as claimed.

13. Petitioner did not respond to the Division's motion.

14. The Division responded to petitioner's inquiry, dated December 22, 2022, requesting that petitioner file a completed form IT-360.1, change of city resident status.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division's motion was properly deemed a motion for summary determination under our Rules and should be granted if it has been sufficiently established that no material and triable issue of fact is presented and that, as a matter of law, a determination should be issued in the Division's favor.

The Administrative Law Judge found that, because petitioner did not respond to the Division's motion and presented no evidence to contest the facts alleged in the affidavits, those facts may be deemed to have been admitted by petitioner.

The Administrative Law Judge next addressed the timeliness of petitioner's request for conciliation conference and whether the Division had carried its burden to show proper mailing of the statutory notice. The Administrative Law Judge observed that, in such cases, the Division must demonstrate the fact and date of the mailing to petitioner's last known address. The Administrative Law Judge noted that the Division can meet this burden by showing that it has a standard mailing procedure for the issuance of statutory notices by one with knowledge of the relevant procedures and that the procedure was followed in this instance. The Administrative Law Judge found that the Division met its burden in this case and concluded that the Division properly mailed the notice on June 15, 2022. The Administrative Law Judge thus determined that petitioner's request for conciliation conference was untimely filed. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner's exception contests the Administrative Law Judge's finding that her request for a conciliation conference was untimely and asks that the Tribunal reconsider the denial of her petition. Petitioner denies that her petition was untimely but does not address the timeliness of her request for a BCMS hearing. Petitioner argues that she did not file her petition late and that she had timely filed an IT-360.1, change of city resident status.

The Division argues that the Administrative Law Judge was correct in her findings that it carried its burden of demonstrating proper mailing of the statutory notice by certified mail to petitioner's last known address on June 15, 2022 and, accordingly, that petitioner's request was

untimely. Further, the Division argues that petitioner provides no legal standard or other rationale to explain how filing an IT-360.1 would impact the timeliness of her request for a BCMS hearing.

OPINION

We affirm the determination of the Administrative Law Judge.

As the petition in this matter was filed within 90 days of the issuance of the conciliation order (*see* Tax Law § 170 [3-a]; Tax Law § 2006 [4]), such petition was timely. Furthermore, the Administrative Law Judge correctly treated the Division’s motion as one for summary determination (*see* 20 NYCRR 3000.9 [b] [1]). Such 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” (*id.*).

Under our Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). It is well-established that “[t]he 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 Village of Patchogue Fire Dept.*, 146 AD2d 572 [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]). “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*).

Here, petitioner did not respond to the Division’s motion. Under such circumstances, petitioner is properly deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]).

Moreover, as petitioner presented no evidence to contest the facts alleged in the affidavits supporting the Division’s motion, those facts are properly deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d at 544 [1975]; *Whelan v GTE Sylvania*).

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 date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]) or 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]). This 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of Am. 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 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).

Where, as here, the timeliness of the filing of a petition or request for BCMS conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing of the relevant statutory notice to petitioner's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *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). To meet its burden, the Division must show proof of a standard mailing procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and proof that the standard procedure was followed in this particular instance (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Where a notice of deficiency of personal income tax is properly mailed, it is valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

We agree with the Administrative Law Judge that the Division's proof establishes that the notice of deficiency dated June 15, 2022 was mailed by USPS certified mail to petitioner's last known address on June 15, 2022. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Additionally, the affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and also show that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing

cover sheets and CMR matches the address on petitioner's 2021 personal income tax return, thus satisfying the "last known address" requirement.

Notwithstanding the fact that the Division responded to petitioner's inquiry dated December 22, 2022, such response does not toll the 90-day period for filing of a request for a BCMS conference or a petition with the Division of Tax Appeals as "statutory deadlines are strictly enforced" (*see Matter of Gilani*, Tax Appeals Tribunal, October 17, 2014). This is because, absent a timely protest, a notice of determination 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; Matter of Sak Smoke Shop*).

Petitioner's request for conciliation conference was filed on January 6, 2023, well-beyond the 90-day period of limitations for the filing of such a request, and was therefore untimely (*see* Tax Law §§ 170 [3-a] [b]; 681 [b]). Accordingly, petitioner's request was properly dismissed by the January 27, 2023, conciliation order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Emilia Kowalewicz is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Emilia Kowalewicz is denied; and
4. The notice of deficiency, dated June 15, 2022, is sustained.

DATED: Albany, New York
August 15, 2024

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner