

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZULFIQAR WYNE	:	DETERMINATION DTA NO. 827739
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for Year 2011.	:	

Petitioner, Zulfiqar Wyne, 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 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion dated December 30, 2016 seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not file a response to the Division's motion. Based upon the motion papers, the affirmation and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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 for the year 2011.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Disallowance dated July 8, 2013 and bearing audit case identification number X-355985023. The notice is addressed to petitioner, Zulfiqar Wyne, at 88 Church Street, Kings Park, New York 11754-1704.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the July 8, 2013 notice. The request was mailed to BCMS on April 9, 2016 and received by BCMS on April 12, 2016.

3. On April 29, 2016, BCMS issued a Conciliation Order Dismissing Request to petitioner. The 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 2 years from the date of the statutory notice. Since the notice(s) was issued on July 8, 2013, but the request was not mailed until April 9, 2016, or in excess of 2 years, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on June 27, 2016.

5. To show proof of proper mailing of the July 8, 2013 notice, the Division provided the following with its motion papers: i) an affidavit, dated November 17, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for DTF-170 Adjusted Refund Denial” (CMR) postmarked July 8, 2013; (iii) an affidavit, dated November 22, 2016, of Bruce Peltier, a supervisor in the Division's mail room; (iv) a copy of the July 8, 2013 notice with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference

mailed on April 9, 2016; and (vi) a copy of petitioner's electronically filed Form IT-201, resident income tax return for the year 2012, filed February 1, 2013, which lists petitioner's address as 88 Church Street, Kings Park, New York 11754. The IT-201 was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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. Each batch of statutory notices is accompanied by a CMR. Each page of the CMR lists an initial 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 only page of the CMR in the present case to the actual mailing date of "7/8/13." In addition, as described by Ms. Nagengast, the CMR for the notices issued on July 8, 2013, including the notice issued to petitioner, consists of one cut sheet page. The page number of the CMR is noted in the upper right corner as "PAGE: 1."

7. All notices are assigned a certified control number. The certified control number of each notice appears on a separate one-page mailing cover sheet, which also bears a bar code, the taxpayer's mailing address and the Departmental return address on the front. 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 audit case identification

numbers are listed under the heading "Reference No." The names and addresses of the taxpayers are listed under "Name of Addressee, Street, and PO Address."

8. The CMR in the present matter consists of one page and lists 11 certified control numbers along with corresponding reference numbers, names and addresses. Ms. Nagengast 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 representative affixed a postmark dated July 8, 2013 to the one-page CMR, circled the number "11" on the CMR next to the heading "Total Pieces And Amounts" and initialed or signed the one-page CMR. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 11.

9. Page one of the CMR indicates that a Notice of Disallowance with certified control number 7104 1002 9735 1255 1461 and reference number X-355985023, was mailed to petitioner at the Kings Park, New York, address listed on the subject Notice of Disallowance. The corresponding mailing cover sheet attached to the Nagengast affidavit as exhibit "B" bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, dated November 22, 2016, describes the Division's mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. A CMR is also received by the mail room for each batch of statutory notices. Mr. Peltier 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. A clerk checks the pieces of certified mail listed on the CMR against the information contained on the CMR. A clerk then performs a review of the 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed the one-page CMR and affixed a postmark dated July 8, 2013 to the CMR.

11. 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. Here, the USPS employee complied with this request by circling the number “11” on the one-page CMR next to the heading “Total Pieces And Amounts.” The affixation of the postmark and the USPS employee’s initials, together with the circled number indicate that a total of 11 articles of mail listed on the CMR were delivered to the USPS on July 8, 2013.

12. According to both the Nagengast and Peltier affidavits, a copy of the subject notice was mailed to petitioner on July 8, 2013, as claimed.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (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 (*see* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner’s request for conciliation conference. This determination shall address the instant motion as such.

B. 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” (20 NYCRR 3000.9[b][1]). 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 v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v. Vil. 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 [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*). As detailed hereafter, there are no material or triable issues of fact presented and the Division is entitled to summary determination in its favor.

C. Petitioner did not respond to the Division’s motion. Accordingly, he is 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], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Nagengast and Peltier affidavits; consequently, those facts are deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*).

D. A notice of disallowance or denial of a claim for refund 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 or refund denial (Tax Law § 689[c], § 170[3-a][a]). Here, petitioner initially chose to challenge the Division's July 8, 2013 Notice of Disallowance by filing a request for conciliation conference. Petitioner's request for conciliation conference challenging the Notice of Disallowance was mailed on April 9, 2016. There is no allegation by petitioner that either a request for conciliation conference or a petition challenging the Notice of Disallowance was filed at any time prior to the foregoing April 9, 2016 request, nor does the record reveal evidence of any such filing.

E. Where, as here, 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 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 has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on July 8, 2013. 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). The affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well

as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002).

G. The Division has also established that the notice was properly sent to petitioner's last known address. The phrase "last known address," for purposes of the Division's issuance of statutory notices carrying with them the right to a hearing, has been defined and consistently interpreted to mean the address given in the last return filed by the taxpayer or in any application made by him, or if no return has been filed or application made, then to such address as may be obtainable (*see Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012; *see also Matter of Nelloquet Restaurant, Inc.*, Tax Appeals Tribunal, March 14, 1996). Here, petitioner's last known address, as indicated on petitioner's 2012 IT-201, was the same Kings Park, New York, address that appears on the subject notice, cover sheet, and CMR.

H. Accordingly, petitioner had two years from the date the Division issued the Notice of Disallowance, July 8, 2013, to file a request for conciliation conference or petition (Tax Law § 689[c]). Because the request for conciliation conference was not filed within the period of limitations specified by Tax Law § 689(c), the same was properly dismissed by BCMS as not timely filed.

I. The Division of Taxation's motion for summary determination is granted, the petition of Zulfiqar Wyne is hereby denied, and the Conciliation Order Dismissing Request dated April 29, 2016 is sustained.

DATED: Albany, New York
April 20, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE