

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VALERIA CAZAC	:	DETERMINATION
	:	DTA NO. 829340
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Taxes	:	
Under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 2015.	:	

Petitioner, Valeria Cazac, filed a petition redetermination of a deficiency or for refund of New York State and New York City personal income taxes under article 22 of the Tax Law and the New York City Administrative Code for the Year 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq.), brought a motion dated February 5, 2020, 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), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation’s motion by the due date of March 9, 2020, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion dated February 5, 2020 for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of deficiency, dated March 26, 2018, and bearing assessment identification number L-047707655 (notice). The notice is addressed to petitioner, Valeria Cazac, at an address in Astoria, New York.

2. On April 19, 2019, petitioner filed a petition with the Division of Tax Appeals in protest of the notice.

3. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affidavit of Maria Matos, sworn to on February 5, 2020, the following with its motion papers: (i) an affidavit, dated January 27, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for – DTF-962-E – Not of Deficiency- DTF-962-F-E –Not Def Follow Up DTF-963-E – Notice of Determination" (CMR) postmarked March 26, 2018; (iii) an affidavit, dated February 4, 2020, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; (v) a copy of petitioner's e-filed 2017 New York state resident income tax return, form IT-201, filed on February 18, 2018, which was the last return filed with the Division before the notice was issued, and (vi) a printout from the United States Postal Service (USPS) website, entitled "Look Up a ZIP Code," and listing petitioner's address.

4. The affidavit of Deena Picard, who has been in her current position since February 2006, and Acting Director since May 2017, 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. 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 last pages of the CMR in the present case to the actual mailing date of "3/26/18." 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.

5. 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."

6. The CMR in the present matter consists of 59 pages and lists 730 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 to 14 such entries with the exception of page 59, which contains 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. A USPS representative affixed a postmark, dated March 26, 2018, to each page of the CMR, wrote the number “730” on page 59 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 59.

7. Page 26 of the CMR indicates that a notice with certified control number 7104 1002 9735 4144 6516 and reference number L 047707655 was mailed to petitioner at the Astoria, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

8. The affidavit of Fred Ramundo a supervisor in the Division’s mail room, describes the mail room’s general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom 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. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of March 26, 2018. On page 59, corresponding to “Total Pieces and Amounts,” is the preprinted number 730 and next to “Total Pieces Received At Post Office” is the handwritten entry “730.” There is a set of initials or a signature on page 59.

9. According to the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on March 26, 2018, as claimed.

10. The USPS printout “Look Up a ZIP Code,” shows that the address listed on petitioner’s 2017 income tax return, “28-15 46TH AV APT 2MD FL ASTORIA NY 11102,” was entered into the database and the only matching address provided by the USPS was “2815 46TH ST APT 2MD FL ASTORIA NY 11103-1209.” According to the affidavit of Ms. Matos, this address provided by the USPS, which matches the address listed on the March 26, 2018 notice to petitioner, confirms the address used for petitioner.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the

subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). A motion for summary determination may 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 judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

Section 3000.9 (c) of the Rules provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212.

Thus, the movant “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 the Tribunal 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 to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1ST Dept 1992], quoting *Zuckerman*). In this case, as the issue is whether the

Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. Petitioner did not respond to the Division's motion. Accordingly, she is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Std. Metals*, 99 AD2d 227 [1ST Dept 1984] *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Matos, Picard and Ramundo affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden* at 544; *Whelan v GTE Sylvania*).

C. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of deficiency (*see* Tax Law §§ 681 [b]; 689 [b]; 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the timeliness of a taxpayer's protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be 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). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*).

F. Here, the Division has offered sufficient proof to establish the mailing of the notice to petitioner's last known address on March 26, 2018. 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 DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conform with the address listed on petitioner's 2017 Resident income tax return, filed with the Division on February 18, 2018, which satisfies the "last known address" requirement.¹

G. It is thus concluded that the Division properly mailed the notice when it was delivered into the custody of the USPS on March 26, 2018. Since it was properly addressed with the

¹ While it is noted that the Division updated petitioner's address, based on information from the USPS (*see* finding of fact 10), such change is deemed inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Moreover, petitioner does not contend that the notice was improperly addressed, nor does she dispute receipt of the notice, and she did not respond to this motion. As such, it is deemed admitted that the address on the notice was petitioner's last known address.

requisite amount of postage affixed, 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]). The Division has established that notice of deficiency L-047707655 was properly mailed as addressed to petitioner at her last known address on March 26, 2018. Having established that the notice of deficiency was properly mailed to petitioner, it was incumbent upon petitioner to file either a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioner did not file a request for conciliation conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until April 19, 2019, a date that falls beyond 90 days after the date of issuance of the notice. Thus, insofar as the petition seeks a hearing on the merits of the notice, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The Division's motion is granted and the petition of Valeria Cazac is hereby dismissed.

DATED: Albany, New York
June 4, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE