

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
EMILIA KOWALEWICZ	:	DETERMINATION
	:	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 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 2021.

On September 6, 2023, Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), brought a motion, dated September 5, 2023, seeking an order of dismissal or, in the alternative, summary determination, in the above-referenced matter, pursuant to sections 3000.5 and 3000.9 (a) (1) (i), (vii) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the motion. The 90-day period for the issuance of this determination commenced on October 6, 2023. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Emilia Kowalewicz, in protest of a notice of deficiency, dated June 15, 2022, and bearing assessment ID number L-055823713 (notice). The notice asserted tax due in the amount of \$437.83 for the year 2021. The notice is addressed to "KOWALEWICZ-EMILIA" at an address in Santa Monica, California. The mailing cover sheet of this notice contains certified control number 7104 1002 9735 1855 8600.

2. Petitioner filed a request with BCMS in protest of the notice. The request was signed and dated by petitioner on January 6, 2023. The request was faxed to and received by BCMS on 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) the 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) an affidavit, dated May 23, 2023, of Susan Ramundo,

a manager in the Division's mail room; (iv) a "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; (v) a copy of the notice of deficiency, dated June 15, 2022, together with the associated mailing cover sheet; (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), filed on April 18, 2022. 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 MAPS since July 2022 and a Principal Administrative Analyst since August 2022. She was a Supervisor of Administrative Analysis from July 2019 through 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. That 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 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 are generated from CARTS and are predated with the anticipated date of mailing. 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 the 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.”

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 page of the CMR includes 11 to 15 such entries, with the exception of page 166, which includes 8 entries. Ms. Denier notes that the copy of the CMR 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 as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

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 mail room and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into 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 listed on the CMR against the information listed on the CMR. Then the clerk performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained 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 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.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) (1) (i) and (vii) 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). As the petition in this matter was filed within 90 days of the conciliation order, 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 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]).

C. 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 determination 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, 441 [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, 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*). 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 v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]).

D. 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 (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice 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]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1966). 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).

E. Where, as here, the timeliness of a request for conciliation conference 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 notice to petitioner’s last known address on June 15, 2022. The CMR has been properly completed and

therefore constitutes highly probative 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 the CMR conform with the address listed on petitioner's electronically filed 2021 tax return, which satisfies the "last known address" requirement.

G. It is therefore concluded that the Division properly mailed the notice on June 15, 2022, 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]; 681 [b]; 689 [b]). Petitioner's request for conciliation conference was filed on January 6, 2023. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the January 27, 2023 conciliation order issued by BCMS.

H. The Division of Taxation's motion for summary determination is hereby granted, the petition of Emilia Kowalewicz is denied and the conciliation order dismissing request, dated January 27, 2023, is sustained.

DATED: Albany, New York
November 30, 2023

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE