STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition<br>of<br>**PANCO EQUIPMENT CORP.**<br>for Revision of a Determination or for Refund of Tax on Petroleum Businesses under Article 13-A of the Tax Law for the Period June 1, 2015 through October 31, 2017. | : | DECISION<br>DTA NO. 828966 |

Petitioner, Panco Equipment Corp., filed an exception to the determination of the Administrative Law Judge issued on July 16, 2020. Petitioner appeared by its treasurer, Joseph M. Tedesco. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

Petitioner filed a brief in support. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was held by teleconference on November 19, 2020. The Tax Appeals Tribunal requested that the Division clarify an answer to a question posed at oral argument, by submission on or before November 25, 2020. The Division provided its answer on November 23, 2020, which date began the 6-month period for issuance of this decision.

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 determination.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge, except for findings of fact 1 and 2, which we have combined and renumbered as finding of fact 1, and finding of fact 5, which we have modified. We have renumbered the Administrative Law Judge's finding of facts 3 through 12 accordingly. We have also added two additional findings of fact, numbered 12 and 13. As so modified, the findings of fact are set forth below.

1. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) on October 17, 2018, in protest of a notice of determination by the Division, dated April 19, 2018, and bearing assessment identification number L-047941942 (notice). The notice was addressed to petitioner, Panco Equipment Corp., at an address in Stony Point, New York.

2. On November 9, 2018, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner.[1] 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 April 19, 2018, but the request was not mailed until October 17, 2018, or in excess of 90 days, the request is late filed."

3. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on November 15, 2018.

[1] BCMS initially sent a letter to petitioner, dated October 26, 2018, advising petitioner that no further action would be taken on its request because the notice and demand, also bearing assessment number L-047941942, did not have formal protest rights. On November 1, 2018, BCMS issued another letter to petitioner, rescinding the October 26, 2018 letter, as it referenced a notice and demand which was issued subsequent to the April 19, 2018 notice of determination at issue herein.

4. The Division brought a motion on December 19, 2019, seeking an order dismissing the petition or, in the alternative, summary determination. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit, dated December 12, 2019, 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-E-Notice of Determination" (CMR), postmarked April 19, 2018; (iii) a copy of the April 19, 2018 notice with the associated mailing cover sheet; (iv) an affidavit, dated December 16, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (v) a copy of petitioner's request for conciliation conference date-stamped received by BCMS on October 19, 2018; (vi) a copy of the conciliation order issued to petitioner on November 9, 2018 (CMS No. 000304733); and (vii) a copy of petitioner's form IFTA-100, quarterly fuel use tax return for the period October 1, 2017 through December 31, 2017, filed on January 31, 2018, which lists the same address for petitioner as that listed on the notice, the request for conciliation conference and the petition. The January 31, 2018 tax return was the last return filed with the Division by petitioner before the notice was issued.

5. The affidavit of Deena Picard, who has been in her current position since May 2017, and 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. 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 one-page CMR in the present case to the actual mailing date of "4/19." 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 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.

6. 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."

7. The CMR in the present matter consists of one page and lists five certified control numbers along with corresponding assessment numbers, names and addresses. 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 April 19, 2018 to the CMR, wrote the number "5," next to the heading "Total Pieces Received at Post Office," and initialed or signed the CMR.

8. The CMR indicates that a notice of determination with certified control number 7104 1002 9735 4208 9699 and assessment ID number L-047941942 was mailed to petitioner at the

Stony Point, 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.

9. The affidavit of Fred Ramundo describes the mail room's general operations and procedures. Mr. Ramundo has been a supervisor in the mail room since 2013 and, as a result, is familiar with the practices of the mailroom 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 retrieves 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.

10. The CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of April 19, 2018. Corresponding to "Total Pieces and Amounts," is the preprinted number "5" and next to "Total Pieces Received at Post Office," the USPS employee wrote the number "5," wrote his or her initials or a signature, and affixed a postmark. According to Mr. Ramundo, the affixation of the postmark and the USPS employee's initials indicate that all of the five articles

of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on April 19, 2018.

11. According to both the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on April 19, 2018, as claimed.

12. Attached to the Division's motion is a copy of the petition filed in this matter. The petition contains copies of correspondence between petitioner and BCMS, including the conciliation order dismissing petitioner's request and its cover letter, as well as emails appearing to be between Mr. Tedesco and Division auditors regarding issuance of the notice of determination. The earliest dated email is June 12, 2018, wherein Mr. Tedesco inquired: "[D]o we receive a final bill in which to schedule a formal protest and an impartial conference?" Following a response from the auditor, and also on June 12, 2018, Mr. Tedesco inquired: "Does that missing notice [of determination] mention how protest [sic] and set up an impartial conference." The latest dated email is September 4, 2018, wherein Mr. Tedesco confirmed receipt of the notice of determination and stated that petitioner "has no choice but to request a conference."

13. At the conclusion of oral argument, the Tax Appeals Tribunal requested that the Division provide confirmation as to whether and when the tax asserted in the notice of determination had been paid by petitioner. A response was requested to be made by email with copy to Mr. Tedesco by November 25, 2020. By email dated November 23, 2020, the Division advised that the tax asserted in the notice of determination was paid by petitioner as of November 30, 2018.

***THE DETERMINATION OF THE ADMINISTRTIVE LAW JUDGE***

The Administrative Law Judge began his determination in this matter by noting that the Division brought a motion to dismiss the petition or, in the alternative, a motion for summary determination. The Administrative Law Judge found that because the petition in protest of BCMS' conciliation order was timely filed, a motion for summary determination was the proper method to consider the timeliness of petitioner's request for a conciliation conference. The Administrative Law Judge continued by setting forth the standard for granting a motion for summary determination, which 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.

Noting that a motion for summary determination is subject to the same provisions as a motion for summary judgment under the CPLR, the Administrative Law Judge described the burden of proof allocated to the proponent of such a motion, who must tender sufficient evidence to eliminate any material issues of fact in order to prevail. If material facts are in dispute, then a full trial is warranted, and the motion should not be decided on a motion. However, according to the Administrative Law Judge, the opponent to a motion for summary determination must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.

The Administrative Law Judge noted that petitioner did not respond to the Division's motion. Thus, according to the Administrative Law Judge, petitioner is deemed to have conceded that no question of fact requiring a hearing exists. Also, because petitioner presented no evidence to contest the facts alleged in the affidavits attached to the Division's motion, those facts were deemed admitted.

The Administrative Law Judge next described the statute of limitations for filing a protest to a notice of determination as 90 days from the date of mailing of that notice; either by filing a petition with the Division of Tax Appeals, or, in the alternative, a request for conciliation conference with BCMS. The Administrative Law Judge noted that this deadline is strictly enforced because once a notice becomes a fixed and final determination, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest.

In determining whether a request for a conciliation conference is timely, the Administrative Law Judge noted that the Division carries the burden of demonstrating the fact and date of mailing of the statutory notice to the petitioner's last known address. The Division meets this burden by showing proof of standard mailing procedures for statutory notices and that such procedures were followed in the instant case. The Administrative Law Judge found that the CMR submitted with the Division's motion was properly completed and constituted sufficient proof to establish mailing of the notice to petitioner on April 19, 2018. Furthermore, the Administrative Law Judge found that the accompanying affidavits of the Division employees established the Division's mailing procedures and the fact they were followed in mailing the notice here at issue. Additionally, the address to which the notice was mailed was the same address as that reported on petitioner's January 2018 tax return, which the Administrative Law Judge found to be petitioner's last known address. Thus, the Administrative Law Judge concluded that the 90-day period to file a timely protest of the notice commenced on April 19, 2018.

The Administrative Law Judge noted that once the Division has demonstrated proper mailing of a notice, such a showing gives rise to a presumption that the notice was received by the person to whom it is addressed. However, in this case, petitioner is only asserting that it

never received the notice, which, according to the Administrative Law Judge, is insufficient to overcome the statutory presumption of receipt.

The Administrative Law Judge concluded that because petitioner did not file its request for conciliation conference until October 17, 2018, such request fell after the 90-day period of limitations for filing such a request and consequently was untimely filed. As such, the request was properly dismissed by BCMS . Accordingly, the Administrative Law Judge granted the Division's motion for summary determination, denied the petition and sustained the conciliation order.

***ARGUMENTS ON EXCEPTION***

Petitioner argues that the Administrative Law Judge erred in concluding that it did not respond to the Division's motion. It also argues that without proof of a certified mail receipt, the Division cannot prove proper mailing of the statutory notice at issue. Petitioner indicates that it had waited for a final notice of determination and was only made aware that a notice had been issued after requesting information about such notice. It states that it is evident from its June 12, 2018 email that petitioner had an intention to file a formal protest to the final audit results, in effect claiming that it made an informal request for a conciliation conference on that date. Petitioner states that because the Division cannot produce a certified mailing receipt, the Division has failed to show proper mailing and the Administrative Law Judge erred in granting summary determination.

The Division argues that the Administrative Law Judge correctly determined that petitioner's request for a conciliation conference was untimely and thus summary determination in the Division's favor was proper. It notes that petitioner failed to respond to the Division's motion to dismiss the petition, or in the alternative, for summary determination, and thus, as a

matter of law, no question of fact requiring a hearing existed. The Division states that petitioner's claim that it did not receive the statutory notice is immaterial where a presumption of receipt arises after the Division demonstrates proper mailing of the subject notice. Ultimately, petitioner failed to offer any evidence to establish that it filed a protest in response to a notice of deficiency before the expiration of the 90-day period following the issuance of the notice. As such, the notice became a fixed and final assessment and the Division of Tax Appeals lacks jurisdiction to consider the merits of the protest.

***OPINION***

At the outset, we note our agreement with the Administrative Law Judge's decision to treat the Division's motion to dismiss the petition as a motion for summary determination. As observed by the Administrative Law Judge, petitioner filed its protest of the conciliation order within 90 days of its issuance. As such, the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination is the proper method for considering the timeliness of petitioner's request for a conciliation conference (***see*** 20 NYCRR 3000.9 [a], [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 our Rules of Practice and Procedure 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 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 [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***).

We concur with the Administrative Law Judge's finding that petitioner did not respond to the Division's motion to dismiss or for summary determination, and thus must be deemed to have conceded that no material issue 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]). Furthermore, petitioner offered no evidence to counter the facts alleged in the Picard and Ramundo affidavits describing the Division's mailing procedure, including the fact and date of mailing of the notice here at issue. As a consequence, those facts are deemed admitted (***Kuehne & Nagel v Baiden***, at 544; ***see also Whelan v GTE Sylvania***)

A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice or filing a request for a conciliation conference with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law §§ 288 [5]; 315 [a]; 170 [3-a] [a]). This 90-day statutory time limit for

filing a protest of a statutory notice is strictly enforced (***see Matter of Am. Woodcraft, Inc.***, Tax Appeals Tribunal, May 15, 2003; ***Matter of Maro Luncheonette***, Tax Appeals Tribunal, February 1, 1996). In the absence of a timely filed protest, a notice of determination becomes a fixed and final assessment, and, consequently, leaves the Division of Tax Appeals no 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).

However, we are mindful 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 the mailing to petitioner's last known address (***see*** Tax Law §§ 288 [5]; 315 [a]); ***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 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).

We agree with the Administrative Law Judge that the Division offered sufficient proof to establish the mailing of the notice here at issue to petitioner at its last known address on April 19, 2018. Specifically, we agree with the Administrative Law Judge that a properly completed CMR, such as the one attached to the Division's motion, constitutes highly probative documentary evidence of both the fact and date of mailing (***see Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe both the Division's general mailing procedure and the attached CMR and thus establish that the general mailing procedure was followed in this instance (***see Matter of DeWeese***, Tax Appeals Tribunal, June 20, 2002). Furthermore, the Division, through its representative, identifies petitioner's last

known address as the address reported on its form IFTA-100 quarterly fuel use tax return, filed on January 21, 2018, which was the last return filed with the Division before issuance of the notice. This address is the same address as the one listed on the notice, the request for conciliation conference and the petition.

We also agree with the Administrative Law Judge that a presumption of receipt arises where the Division has shown that a notice was properly mailed (***see*** Tax Law § 289-d [2]). We do not agree with petitioner that proof of proper mailing requires the Division to provide proof of receipt; such an interpretation is antithetical to the statutory presumption of receipt that arises once the Division has shown proof of its general mailing procedures and that such procedures were followed with respect to the notice at issue. Petitioner does not contest proper mailing of the notice by the Division, but rather denies receipt of the same. Mere denial of receipt of a statutory notice, without more, however, is insufficient to overcome the statutory presumption of receipt (***see Matter of T.J. Gulf v New York State Tax Commn.***, 124 AD2d 314 [3d Dept 1986]; ***Matter of Rosenbaum***, Tax Appeals Tribunal, November 5, 2018).

As petitioner's formal request for a conciliation conference was filed on October 17, 2018, in protest of a notice of determination issued on April 19, 2018, that request for a conciliation conference was untimely as it was filed more than 90 days after issuance of the notice (***see*** Tax Law §§ 170 [3-a]; 288 [a] [5]; 315 [a]). However, even in the absence of a timely formal request for a conciliation conference, we have recognized that an informal request for a conciliation conference, notwithstanding noncompliance with one or more formal requirements of filing, is sufficient to preserve a taxpayer's protest rights so long as it is timely made (***see Matter of Tsoumas***, Tax Appeals Tribunal, June 15, 2017; ***Matter of Crispo***, Tax Appeals Tribunal, April 13, 1995). The informal claim doctrine, developed under federal tax

law, provides that an informal claim "must put the taxing authority on notice, within the relevant period of limitations, that the taxpayer is making a refund claim, requesting a conciliation conference or filing a petition" (***Matter of Tsoumas***; ***see also United States v Kales***, 314 US 186, 194 [1941]. An informal claim or protest must have a written component that includes the specific years or periods involved and the basis for the claim (***Hollie v Commr.***, 73 TC 1198, 1213 [1980]; ***Matter of Glover Bottled Gas Corp.***, Tax Appeals Tribunal, September 27, 1990). The sufficiency of the written component must be considered in the context of the surrounding circumstances (***American Radiator & Sanitary Corp. v U.S.***, 162 Ct. Cl. 106, 114 [1963]). Ultimately, the question to be answered is whether the taxing authority knew or should have known that a refund claim was being made or a request for conciliation conference or petition was being filed (***see Krape v Commr.***, TC Memo 2007-125).

Petitioner argues that its interactions with the Division by and through its treasurer, Mr. Tedesco, put the Division on notice that petitioner was protesting the final audit results. In effect, it argues that the emails dated June 12, 2018, provided the written component of an informal protest of the audit case referenced in the emails. We do not agree. The emails show that petitioner was inquiring as to how to file a protest of the audit results, rather than stating that it was filing such a protest (***see Matter of Tsoumas***). In contrast, petitioner's email dated September 4, 2018 unequivocally states that petitioner "has no choice but to request a conference" in protest of the notice. However, because September 4, 2018, falls after the end of the limitations period for filing a protest, it cannot be deemed an informal protest of the notice. Additionally, the June 6, 2018 emails were directed to the auditor, rather than BCMS, the entity to which a request for conciliation conference is properly directed (***id.***).

We thus conclude that petitioner's email correspondence with the auditors did not constitute a timely informal request for conciliation conference. Consequently, petitioner's October 17, 2018 formal request was properly dismissed by the November 9, 2018 conciliation order issued by BCMS.

We note that petitioner may not be without recourse. Assuming it has paid the tax asserted in the notice of determination here at issue (***see*** finding of fact 13), it may file a claim for refund, provided that such refund claim is timely filed within the applicable statute of limitations on refund claims (***see*** Tax Law § 289-c [6]; 20 NYCRR 415.2).

We note that petitioner offered certain documents with his exception that were not part of the record before the Administrative Law Judge. This Tribunal has consistently held that we will not consider evidence offered with an exception if such evidence was not part of the record before the Administrative Law Judge (***see e.g Matter of Strohli***, Tax Appeals Tribunal, December 19, 1996; ***Matter of Ippolito***, Tax Appeals Tribunal, August 23, 2012, ***confirmed*** 116 AD3d 1176 [3d Dept 2014]). Hence, we do not consider the documents newly offered by petitioner with the exception (***see Matter of Tsoumas***).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Panco Equipment Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Panco Equipment Corp. is denied; and
4. The conciliation order dated November 9, 2018, is sustained.

DATED: Albany, New York
May 24, 2021

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner