

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
CRYSTALLEE VARGAS
for Redetermination of Deficiencies or for Refund of
New York State Personal Income Tax under
Article 22 of the Tax Law for the Years 2017 and 2018.

DECISION
DTA NO. 829867

Petitioner, Crystallee Vargas, filed an exception to the determination of the Administrative Law Judge issued on December 23, 2020. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Mary Hurteau, 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 June 24, 2021, 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 notices of deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 1 and 10 for clarity. These findings of facts, so modified, are set forth

below.

1. The Division of Taxation (Division) brought a motion dated September 1, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the present matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Tax Appeals Tribunal Rules of Practice and Procedure (Rules). The subject of the Division's motion is the timeliness of petitioner's protest of notices of deficiency dated August 27, 2019 and bearing respective assessment identification numbers L-050190536 and L-050186387 (notices). The notices were addressed to petitioner, Crystallee Vargas, at an address in Farmingville, New York.

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices by way of facsimile on January 31, 2020. The request includes a fax machine date and time stamp indicating that the faxed transmission of the request was completed on January 31, 2020 at 5:42 p.m.

3. On February 14, 2020, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. 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 August 27, 2019, but the request was not received until January 31, 2020, 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 18, 2020.

5. To show proof of proper mailing of the notices, the Division provided the following:
(i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director

of the Division's Management Analysis and Project Services Bureau (MAPS), dated August 13, 2020; (ii) a certified mail register titled: "CERTIFIED RECORD FOR – DTF – 962-F-E – Not of Def Follow Up" (CMR) postmarked August 27, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated August 13, 2020; (iv) a copy of the notices with the associated mailing cover sheets addressed to petitioner; (v) an affidavit of the Division's attorney, Mary Hurteau, Esq., dated September 1, 2020; and, (vi) a copy of the petitioner's New York State personal income tax return (form IT-201) for the year 2018, which lists the same address for petitioner as that listed on the notices, except that petitioner's address on the notices includes an additional four zip code digits to petitioner's five-digit zip code. According to the affidavit of Mary Hurteau, the 2018 income tax return was the last return filed with the Division by petitioner before the notices were issued.

6. 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 familiar with the Division's Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with 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 is manually changed on the first and last page of the CMR to the actual date of mailing of "8/27/19." 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.

7. 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 P.O. ADDRESS."

8. The August 27, 2019 CMR consists of 10 pages and lists 135 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR 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 August 27, 2019 to each page of the CMR, initialed and wrote the number "135" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE."

9. Page 9 of the CMR indicates that notices of deficiency with certified control numbers 7104 1002 9735 5072 7224 and 7104 1002 9735 5072 7231 and assessment ID numbers L-050186387 and L-050190536, respectively, were mailed to petitioner at the Farmingville, New York, address listed on the notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear this certified control number and petitioner's name and address as noted.

10. The affidavit of Susan Saccocio describes the general operations and procedures of the Division's mail room. Ms. Saccocio has been a manager in the mail room since 2017 and has been employed there since 2012, and as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Saccocio 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 contained on the CMR. A clerk then performs a random review of 30 or fewer 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. Here, the USPS employee initialed the last page of the CMR and affixed a postmark to each page of the CMR. 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. A review of the August 27, 2019 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the CMR.

11. According to the affidavits submitted, copies of the notices were properly mailed to petitioner at her Farmingville, New York, address on the date indicated as claimed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found, first, that the Division's motion is properly deemed a motion for summary determination under the (Rules). Next, the Administrative Law Judge

observed that such a motion shall be granted if the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented. The Administrative Law Judge noted that in order to defeat a motion for summary judgment, the opponent must produce proof sufficient to require a trial of material questions of fact on which the claim is based.

The Administrative Law Judge found that petitioner did not respond to the Division's motion. Accordingly, petitioner was deemed to have conceded that no question of fact requiring a hearing exists.

The Administrative Law Judge next addressed the timeliness of petitioner's request for conciliation conference. The Administrative Law Judge described the Division's burden of proof where it claims that a taxpayer did not timely file a protest of the notices. In such a case, the Division must demonstrate the fact and date of the mailing to petitioner's last known address to show proper mailing of the notices by showing proof of a standard procedure for issuance of statutory notices along with proof that such a procedure was followed in this instance. The Administrative Law Judge found that the Division met this burden here. The Administrative Law Judge thus concluded that the Division properly mailed the notices on August 27, 2019, and accordingly that the request for conciliation conference was untimely filed. The Administrative Law Judge therefore granted the Division's motion for summary determination, denied the petition and sustained the BCMS order dismissing petitioner's request for a reconciliation conference.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that she had provided the Division with the documents it needed to resolve her disagreement with the notices issued to her. She attributes some of the

delay in providing those documents to her former representative, who was subsequently found to be unqualified to represent taxpayers before the Division of Tax Appeals. Petitioner asserts that her job as a New York City police officer required her to work long hours throughout the pendency of this matter. Petitioner offered no evidence or argument on the issue of the timeliness of her request for conciliation conference.

The Division argues that the Administrative Law Judge correctly decided all the issues presented below and asks this Tribunal to affirm the determination of the Administrative Law Judge. The Division states that it carried its burden of proof in demonstrating proper mailing of the notices and that petitioner failed to address whether her request for a BCMS was filed within the statutory 90-day time limit. According to the Division, this 90-day time limit to file a petition or request for a BCMS conference is strictly enforced, and thus petitioner missed her chance to petition for review of the notices here at issue.

OPINION

We begin our decision by noting our agreement with the Administrative Law Judge's characterization of the Division's motion below as one for summary determination, as the petition in this matter was filed within 90 days of the issuance of the conciliation order (*see* Tax Law § 170 [3-a]; 20 NYCRR 3000.9 [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]).

Under our Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (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, we observe that petitioner did not respond to the Division’s motion. We agree with the Administrative Law Judge that in such an instance, 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]). As petitioner presented no evidence to contest the facts alleged in the affidavits supporting the Division’s motion, those facts are likewise properly deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *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 American 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 the timeliness of the filing of a petition or request for BCMS conference is at issue, we first determine 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 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). We agree with the Administrative Law Judge that the Division has met its burden by offering proof sufficient to establish the mailing of the notices to petitioner’s last known address on August 27, 2019. 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 sheets and CMR is the same one listed on petitioner's 2018 personal income tax return, thus satisfying the "last known address" requirement.¹ Since the BCMS conciliation conference request form was not filed until January 31, 2020, more than 90 days from the issuance of the August 27, 2019 notices, the request was untimely, and we thus conclude that the Division of Tax Appeals is without jurisdiction to provide a hearing to address the substantive merits of the petition (*see Matter of Lukacs; Matter of Sak Smoke Shop*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Crystallee Vargas is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Crystallee Vargas is denied; and
4. The conciliation order, dated February 14, 2020, is sustained.

¹ While it is noted that the Division added 4 additional zip code digits to petitioner's zip code as reflected on her 2018 personal income tax return filed, there is no evidence in the record to indicate that the 4 digits were incorrect for petitioner's address. In any event, such a difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Combemale*, Tax Appeals Tribunal March 31, 1994).

DATED: Albany, New York
November 18, 2021

/s/ Anthony Giardina
Anthony Giardina
President

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

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