

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DAWNE M. WILLIAMS	:	DECISION
	:	DTA NO. 830304
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2019.	:	

Petitioner, Dawne M. Williams, filed an exception to the determination of the Administrative Law Judge issued on June 16, 2022. Petitioner appeared by Omar Folkes, EA. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel).

Petitioner did not file a brief in support of her petition. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on September 13, 2022, 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 a notice of deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set

forth below.

1. Petitioner, Dawne M. Williams, timely filed a 2019 New York resident income tax return, form IT-201 (2019 return), providing an address in Riverhead, New York.

2. The Division of Taxation (Division) issued petitioner notice of deficiency L-051591243 for tax year 2019 on August 12, 2020. The notice is addressed to petitioner at the same Riverhead, New York, address.

3. Petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) regarding notice L-051591243 on December 19, 2020. Petitioner provided the same Riverhead, New York, address on her request as was on the notice and her 2019 return. BCMS dismissed petitioner's request as untimely by conciliation order dismissing request (conciliation order) number 000325935, dated January 15, 2021. The order provided that petitioner requested a conciliation conference more than 90 days after notice L-051591243 was issued.

4. Petitioner responded to the conciliation order by timely filing a petition with the Division of Tax Appeals on February 2, 2021. In her petition, petitioner states that she is requesting a conciliation conference because of a paperwork mistake. She stated that she has lived in Flanders, New York, since September 2018, but her previous residence continues to be leased in her name. She stated that on the original return for 2019, her accountant did not record her move from New York City to Long Island, New York, where she presently resides. Petitioner attached to the petition, in relevant part, the conciliation order, the request for conciliation conference, an amended resident income tax return, IT-201-X, for tax year 2018, and a statement of proposed audit change for tax year 2019. The address on the amended return is the same address to which the notice was issued.

5. The Division filed its answer to the petition, affirmatively alleging, among other things, that petitioner's challenge to notice L-051591243 was untimely because she failed to file a request for a conference with BCMS or a petition with the Division of Tax Appeals within 90 days of its issuance.

6. On February 22, 2022, the Division filed a motion seeking the dismissal of the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9 (a) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of the motion, the Division provided the following documents: (i) an affirmation of Colleen M. McMahon, Esq., dated February 22, 2022; (ii) an affidavit of Deena Picard, sworn to on September 23, 2021; (iii) a certified mail record (CMR) entitled "Certified Record for – DTF-962-F-E – Not of Def Follow Up" postmarked August 12, 2020; (iv) a copy of notice L-051591243 with its associated mailing cover sheet; (v) an affidavit of Susan Saccocio, sworn to on September 24, 2021; (vi) a copy of the first page of petitioner's request for conciliation conference for notice L-051591243, dated December 18, 2020; (vii) a copy of the conciliation order dismissing request for notice L-051591243; and (viii) a copy of petitioner's 2019 return.

7. Ms. McMahon, an attorney in the Office of Counsel of the Division, asserts in her affirmation that petitioner's 2019 return was filed on March 21, 2020, and that this was the last return filed before the Division issued notice L-051591243. She also avers that the notice was issued to petitioner's last known address in Riverhead, New York.

8. Deena Picard has been the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS) since May 2017. She is also a Data Processing Fiscal Systems Auditor 3 and has held that position since February 2006. In performing her duties for both positions, Ms. Picard has used the Division's electronic Case and Resource Tracking

System (CARTS), which generates statutory notices, including notices of deficiency. 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. Ms. Picard's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

9. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number for each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

10. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." The statutory notice 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

11. All pages of the CMR are banded together when the documents are delivered to the Division's mail room 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.

12. Here, the CMR for the notices issued by the Division on August 12, 2020, including notice L-051591243, consists of 121 pages with certified control numbers and corresponding assessment numbers, names, and addresses. Each of the pages consists of 12 to 15 entries except for page 121, which consists of 11 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.

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. In the instant case, the actual mailing date as handwritten on the first and last page of the CMR was "8/12." A United States Postal Service (USPS) representative affixed a postmark, dated August 12, 2020, to each page of the CMR, wrote "1,657" on page 121 next to the heading "Total Pieces and Amounts 1,657," and initialed the page.

13. Page 93 of the CMR indicates that notice L-051591243 with certified control number 7104 1002 9735 0061 2419 was mailed to petitioner at her Riverhead, New York, address. The corresponding mailing cover sheet, attached to the Picard affidavit with the notice as exhibit "B," bears this certified control number, petitioner's name, and her address as stated above.

14. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on August 12, 2020.

15. Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures in her affidavit as they relate to statutory notices. Ms. Saccocio has been a manager in the mail room since 2017. As a mail room manager, Ms. Saccocio is knowledgeable regarding past and present office procedures as they relate to

statutory notices. Ms. Saccocio's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Post Office.

16. The mail room receives statutory notices with their mailing cover sheets that are ready for mailing in an "Outgoing Certified Mail" area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified 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 writes his or her initials or signature on the CMR, indicating receipt by the post office. The mail room also 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. 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.

17. Ms. Saccocio avers that each page of the CMR in exhibit "A" of the Picard affidavit contains a postmark of August 12, 2020, and that a USPS employee initialed or signed page 121 of the CMR and wrote the total number of pieces of certified mail received. A review of the CMR confirms this assertion.

18. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on August 12, 2020, an employee of the mail room delivered one piece of certified mail addressed to petitioner at her Riverhead, New York, address in a sealed postpaid envelope for delivery. She also stated that the CMR delivered to the USPS on August 12, 2020, was returned to the Division. Ms. Saccocio attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on August 12, 2020.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division's motion was properly deemed a motion for summary determination under the Tax Appeals Tribunal Rules of Practice and Procedure (Rules) and should be granted if it has been sufficiently established that no material and triable issue of fact is presented, and that, as a matter of law, a determination should be issued in the Division's favor.

The Administrative Law Judge found that, because petitioner did not respond to the Division's motion and presented no evidence to contest the facts alleged in the affidavits, those facts may be deemed to have been admitted by petitioner.

The Administrative Law Judge next addressed the timeliness of petitioner's request for conciliation conference and whether the Division had carried its burden to show proper mailing of the statutory notice. The Administrative Law Judge observed that, in such cases, the Division must demonstrate the fact and date of the mailing to petitioner's last known address. The Administrative Law Judge noted that the Division can meet this burden by showing that it has a

standard mailing procedure for the issuance of statutory notices by one with knowledge of the relevant procedures and that the procedure was followed in this instance. The Administrative Law Judge found that the Division met its burden in this case and concluded that the Division properly mailed the notice on August 12, 2020. The Administrative Law Judge thus determined that petitioner's request for conciliation conference was untimely filed. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner's exception does not contest the Administrative Law Judge's finding that her request for a conciliation conference was untimely, but nonetheless asks that the Tribunal reconsider the denial of her petition. The Division argues that the Administrative Law Judge was correct in her findings that it carried its burden of demonstrating proper mailing of the statutory notice by certified mail to petitioner's last known address on August 12, 2020 and, accordingly, that petitioner's request was untimely.

OPINION

We affirm the determination of the Administrative Law Judge.

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]), the Administrative Law Judge correctly treated the Division's motion as one for summary determination. Such motion "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]).

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, petitioner did not respond to the Division’s motion. Under such circumstances, 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]).

Moreover, as petitioner presented no evidence to contest the facts alleged in the affidavits supporting the Division’s motion, those facts are properly deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 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, as here, the timeliness of the filing of a petition or request for BCMS conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing of the relevant statutory notice to petitioner’s last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To meet its burden, the Division must show proof of a standard mailing procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and proof that the standard procedure was followed in this particular instance (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Where a notice of deficiency of personal income tax is properly mailed, it is

valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

We agree with the Administrative Law Judge that the Division's proof establishes that notice of deficiency L-051591243 was mailed by USPS certified mail to petitioner's last known address on August 12, 2020. 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). Additionally, the affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and also show 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 matches the address on petitioner's 2019 personal income tax return, thus satisfying the "last known address" requirement.

Petitioner's request for conciliation conference for notice L-051591243 was filed on December 19, 2020, well-beyond the 90-day period of limitations for the filing of such a request and was therefore untimely (*see* Tax Law §§ 170 [3-a] [b]; 681 [b]). Accordingly, petitioner's request was properly dismissed by the January 15, 2021 conciliation order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dawne M. Williams is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dawne M. Williams is denied; and
4. The conciliation order, dated January 15, 2021, is sustained.

Dated: Albany, New York
March 9, 2023

/s/ Anthony Giardina
Anthony Giardina
President

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

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