

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANNE-VERONIQUE BRUEL	:	
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2020.	:	DECISION DTA NO. 831394
	:	

Petitioner, Anne-Veronique Bruel, filed an exception to the determination of the Supervising Administrative Law Judge issued on April 18, 2024. Petitioners appeared by Vialto Partners (Nora C. Sweeney [formerly Nora C. Sagendorf], EA and Kathleen McDermott). The Division of Taxation appeared by Amanda Hiller, Esq. (Mark O’Higgins, Esq., of counsel).

Petitioner did not file a brief in support with the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for issuance of this decision began on July 16, 2024, the date that petitioner’s letter brief in reply was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Supervising Administrative Law Judge erred in determining that petitioner did not file a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge except for finding of fact 1 which we have modified to reflect the record more fully. As so modified, these facts are set forth below.

1. The Division of Taxation's (Division) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS No. 000337240, dated May 12, 2023, to petitioner at an address in New York, New York. The conciliation order sustained a notice of deficiency dated January 12, 2022, and bearing the assessment identification number L-054745182-6 issued to petitioner for the year 2020.

2. On August 16, 2023, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order.

3. On November 9, 2023, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition stated that the petition appeared to be untimely filed as it was filed more than 90 days after the issuance of the conciliation order.

4. In response to the issuance of the notice of intent to dismiss petition, and to show proof of proper mailing of the conciliation order dated May 12, 2023, the Division submitted, among other documents: (i) an affirmation, dated January 16, 2024, of Mark O'Higgins, an attorney employed by the Division; (ii) an affidavit, dated January 8, 2024, of Joseph DiGaudio, Assistant Director of BCMS; (iii) an affidavit, dated January 8, 2024, of Susan Ramundo, manager of the Division's mail room; (iv) a "Certified Record for Manual Mail - CMS-37 - BCMS Order," postmarked May 12, 2023 (CMR); (v) a copy of the request for conciliation conference, dated February 25, 2022, listing a New York, New York, address for petitioner and a

Stamford, Connecticut, address for petitioner's representative; (vi) a copy of a fully executed power of attorney, form POA-1, dated December 2, 2021, that authorized Nora Sagendorf as petitioner's representative, and listed a Stamford, Connecticut, address; (vii) and copies of the conciliation orders addressed to petitioner and petitioner's representative, with the associated cover letters and cover sheets, dated May 12, 2023.

5. The affidavit of Joseph DiGaudio sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

6. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a conference supervisor for final approval.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Manual Mail." The CMR is a listing of taxpayers, including representatives, to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." The AFP Unit prints the CMR and cover

sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk's regular duties include associating each cover sheet, cover letter, and conciliation order. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number bar code, and name and address of the taxpayer appear.

10. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

11. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case, "5-12-23" was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, are picked up from BCMS by an employee of the Division's mail processing center.

13. Mr. DiGaudio attests to the truth and accuracy of the copy of the 8-page CMR, which contains a list of the conciliation orders issued by the Division on May 12, 2023. Each such certified control number is assigned to an item of mail listed on seven pages of the CMR. Page eight does not list any conciliation orders. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the name and address of the addressee.

14. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 9207 1041 0029 7351 043833 is reference number 000337240, along with petitioner's name and the New York, New York, address that is identical to her address listed on her request for conciliation conference. Additionally, information regarding the conciliation order issued to petitioner's representative is contained on page five of the CMR. Specifically, corresponding to certified control number 9207 1041 0029 7351 044380 is reference number 000337240, along with the name of petitioner's representative and the Stamford, Connecticut, address that is identical to her address listed on the request for conciliation conference and form POA-1.

15. 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 processing center staff, attested to the regular procedures followed by her staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. She stated that after a conciliation order is placed in the "Outgoing Certified Mail" basket in the mail processing center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in the Albany, New York, area. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

16. In this particular instance, the postal employee affixed a postmark dated May 12, 2023, to each page of the 8-page CMR. The postal employee wrote the number "85" and signed the last page to indicate the total pieces of mail received at the post office.

17. Ms. Ramundo stated that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's mail processing center, the CMR is picked up at the post office by a member of Ms. Ramundo's staff on the following day after its initial delivery and is then delivered to the originating office, in this case, BCMS. The CMR is maintained by BCMS in the regular course of business.

18. Based upon her review of the affidavit of Joseph DiGaudio, the exhibits attached thereto and the CMR, Ms. Ramundo avers that on May 12, 2023, an employee of the mail processing center delivered (1) an item of certified mail addressed to petitioner at the New York, New York, address and (2) an item of certified mail addressed to petitioner's representative at the Stamford, Connecticut, address to a branch of the USPS in the Albany, New York, area in a sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to, and accepted by, the post office on May 12, 2023, for the records of BCMS. Ms. Ramundo asserts that the procedures described in her affidavit are the regular procedures followed by the mail processing center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner and petitioner's representative on May 12, 2023.

19. Petitioner did not submit a response to the notice of intent to dismiss petition.

THE DETERMINATION OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge began her determination by noting that the standard for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination. The Supervising Administrative Law Judge noted that a

motion for summary determination under our Rules of Practice and Procedure (Rules) 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 Supervising Administrative Law Judge next addressed the timeliness of a taxpayer's petition following a conciliation order and stated that the initial inquiry focuses on whether the conciliation order was properly issued. The Supervising Administrative Law Judge determined that the Division has met its burden of establishing proper mailing of the conciliation order with the accompanying cover sheet and cover letter to petitioner's last known address.

The Supervising Law Judge noted that the 90-day period for filing a petition or request for conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice. Here, the Supervising Law Judge determined that the conciliation order was sent by certified mail to Nora Sagendorf, the representative petitioner had designated to receive legal notices on form POA-1. Ms. Sagendorf's address on the mailing cover sheet and the CMR conform with the address listed on the request for conciliation conference and the POA-1. Additionally, the Supervising Administrative Law Judge found that the Division met its burden of proof regarding its standard procedure for mailing a copy of the notice to petitioner's representative was followed in this case. The Supervising Administrative Law Judge found that the conciliation order was properly mailed to petitioner and petitioner's representative at their last known addresses, and the 90-day limitations period for filing a petition in this matter commenced as of the date of mailing, i.e., on May 12, 2023. As petitioner did not file the petition until August 16, 2023, a date that falls beyond 90 days after the issuance of the conciliation order, the Supervising Administrative Law Judge found that the petition was untimely, and the Division of Tax Appeals lacks jurisdiction to address it.

ARGUMENTS ON EXCEPTION

Petitioner, in her exception, argues that she ceased being a New York State resident in 2020. Petitioner asserts that as the conciliation order was sent to petitioner at the New York State address, it took a significant amount of time for the conciliation order to be re-routed to petitioner in France, and subsequently delayed petitioner's attempt to engage her representative to respond to the conciliation order. Petitioner asserts that the global mobility practice of PricewaterhouseCoopers (PwC) was sold to Vialto Partners on April 29, 2022, and therefore the Stamford, Connecticut address provided on both the POA-1 and the request for conciliation conference ceased to be the place of business for petitioner's representative. Petitioner contends that since the certified mail was delivered to the mailing room of petitioner's New York address where she ceased to work after 2020, the documents were not properly *delivered* to petitioner. Petitioner argues that the auditor involved in petitioner's audit had a reason to know that petitioner ceased being a New York resident post 2020 based on their communication exchange. Accordingly, petitioner contends that she was denied the opportunity to respond to the notice of intent to dismiss.

The Division, in their brief in opposition assert that the Division properly mailed the conciliation order to petitioner and her representative at their *last known addresses*. The Division argues that Tax Law § 681 (a) requires the Division to mail a notice of deficiency to the taxpayer's last known address. Furthermore, the Division notes that for the purposes of Article 22 of the Tax Law, a taxpayer's last known address is defined as the address given in the last return filed by the taxpayer, unless "subsequent to the filing of such return the taxpayer shall have notified the [Division] of a change of address" (Tax Law § 691 [b]). The Division argues

that the notice was properly mailed to petitioner and petitioner's representative at the same address as on petitioner's 2020 tax return and the conciliation conference request.

The Division asserts that petitioner's arguments about the underlying assessments are not before the Tribunal as absent a timely filed petition, the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

OPINION

We affirm the determination of the Supervising Administrative Law Judge. A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). “[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*).

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]) 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]). Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. This 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see Matter of Kowalewicz*, Tax Appeals Tribunal, August 15, 2024; *see also Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

Where, as here, the timeliness of a taxpayer’s petition is in question, we must first determine whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer at the taxpayer’s *last known address* (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). A conciliation order is properly mailed when it is delivered into the custody of the USPS, properly addressed, and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a conciliation order is found to have been properly mailed by the Division to the taxpayer’s last known address by certified or registered mail, petitioner bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

The Division has met their burden of showing that proper mailing procedures were followed. The affidavits of Joseph DiGaudio and Susan Ramundo, two Division employees

involved in, and possessing knowledge of said procedures confirm that the conciliation order was mailed by following the standard mailing procedures (*see* findings of fact 17 and 18). We find that the conciliation order was properly mailed to petitioner and petitioner's representative at their *last known addresses*, respectively; and therefore, constitutes highly probative evidence of both the date and fact of mailing (*see Matter of McAleese*, Tax Appeals Tribunal, June 30, 2016; *see also Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

The conciliation order was properly mailed when it was delivered into the custody of the USPS on May 12, 2023, and properly addressed to petitioner and petitioner's representative at their last known addresses with the requisite amount of postage affixed. The evidence demonstrates that the conciliation order was sent by certified mail to Nora Sagendorf, the representative petitioner had designated to receive legal notices on form POA-1. Ms. Sagendorf's address on the mailing cover sheet and the CMR conform with the address listed on the request for conciliation conference and the POA-1. Hence, the 90-day limitations period for filing a petition in this matter commenced as of the date of mailing, i.e., on May 12, 2023. However, the petition was not filed until August 16, 2023, a date that falls beyond 90 days after the issuance of the conciliation order.

Finally, petitioner's arguments on exception lack merit. Petitioner attempts to argue that the notices were not delivered to petitioner's New York State address on record as known to the Division and the Division received clear and concise notification of petitioner's change of address as early as November 28, 2022. Petitioner claims that the Division's auditor, Mrs. Shannon Weinfurtner, was aware of petitioner's change of address as early as November 2022. Petitioner also asserts that the notices were not received by petitioner's former representative, PwC, which was sold to Vialto Partners. Thus, according to petitioner, any mail delivered to

the Stamford, Connecticut location would have been subject to a lengthy mail forwarding process. We find that petitioner's arguments lack merit.

Tax Law § 691 (b) provides that “[f]or purposes of this [Article 22], a taxpayer's last known address shall be the address given in the last return filed by [the taxpayer] unless subsequently to the filing of such return the taxpayer shall have notified the [Division] of a change of address” (*see Matter of Harel*, Tax Appeals Tribunal, April 27, 2023).

Here, the notices were sent to the Stamford, Connecticut address provided on both the POA-1 and the request for conciliation conference. We have held that the power of attorney “puts the representative in the taxpayer's place, it is reasonable to treat the power of attorney the same as a last return filed” (*Matter of Oberlander*, Tax Appeals Tribunal, August 24, 2020). In light of the circumstances as they were at the time the notices were issued, the Division exercised the requisite diligence in relying on the address used in petitioner's Power of Attorney and the request for conciliation conference (*see Matter of Kallianpur*, Tax Appeals Tribunal, May 29, 2019). Furthermore, the record contains no evidence indicating that petitioner gave the Division “clear and concise notification” of a change of address prior to the mailing of the notice” (*Matter of Sarmiento*, Tax Appeals Tribunal, December 20, 2018; *see also Matter of Manthas*, Tax Appeals Tribunal, June 1, 2017, citing *Alta Sierra Vista, Inc. v Commr*, 62 TC 367, 374 [1974], *affd* 538 F2d 334 [9th Cir 1976]). Therefore, through submission of a properly completed CMR, the Division has borne its burden of demonstrating that the notice was properly addressed and mailed to petitioner.

Additionally, petitioner's assertions do not toll the 90-day period for filing a petition with the Division of Tax Appeals as “statutory deadlines are strictly enforced” (*see Kowalewicz; Matter of Gilani*, Tax Appeals Tribunal, October 12, 2017). This is because, absent a timely

protest, a notice of determination 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 Lukacs*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Anne-Veronique Buel is denied;
2. The determination of the Supervising Administrative Law Judge is affirmed; and
3. The petition of Anne-Veronique Buel is dismissed; and
4. The notice of deficiency dated January 12, 2022 is sustained.

DATED: Albany, New York
January 16, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

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

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner