

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STEPHANIE A. KULAS : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 828071
York State Personal Income Tax under Article 22 of the :
Tax Law for the Year 2006. :

Petitioner, Stephanie A. Kulas, 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 2006.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), brought a motion dated March 5, 2019, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on April 23, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, 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 petitioner's protest of a notice of deficiency, dated March 3, 2014, and bearing assessment identification number L-040652906 (the notice). The notice is addressed to petitioner, Stephanie A. Kulas, at "150 W 88TH ST APT 3B New York, NY 10024-2430," and asserts personal income tax due for the tax year ended December 31, 2006.

2. By a request for conciliation conference dated October 5, 2016, bearing a postmark made by the postal service of the United Kingdom, and received by BCMS on October 11, 2016, petitioner filed a protest of the notice with the Division's Bureau of Conciliation and Mediation Services (BCMS).

3. On October 28, 2016, 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 March 3, 2014, but the request was not received until October 11, 2016, or in excess of 90 days, the request is late filed."

4. Petitioner filed a petition dated January 26, 2017, with the Division of Tax Appeals in protest of the conciliation order, which was received by the Division of Tax Appeals on February 6, 2017. The envelope containing the petition bore a postmark of the United Kingdom dated January 30, 2017. In her petition, petitioner stated that she forgot to file her 2006 tax returns with New York State because she had moved out of the country and did not receive a reminder to do so. She also indicated that she did not send a forwarding address to the Division.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit, dated February 26, 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 Presort Mail - Assessments Receivable" (CMR) postmarked March 3, 2014; (iii) an affidavit, dated February 28, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (v) a copy of petitioner's request for conciliation conference, filed with BCMS on October 11, 2016; (vi) an affidavit, dated February 28, 2019, of Diane M. Rynski, a Taxpayer Services Administrator 3 in the Division's Office of Processing and Taxpayer Services, together with a transcript of petitioner's personal income tax return (form IT-201), filed for the year 2005 on April 15, 2006. The 2005 income tax return was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously 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 first and last pages of the CMR in the present case to the actual mailing date of "3/3/14." 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 Division's 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."

8. The March 3, 2014 CMR consists of 1,105 pages and lists 12,149 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 1,105, which contains 5 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. A USPS representative affixed a postmark dated March 3, 2014 to each page of the CMR, wrote the number "12149" on page 1,105 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 1,105.

9. Page 124 of the CMR indicates that a notice with certified control number 7104 1002 9730 0182 3291 and reference number L-040652906 was mailed to petitioner at the New York, New York, address listed on that notice (*see* finding of fact 1). 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.

10. The affidavit of Fred Ramundo describes the general operations and procedures of the Division’s mail room. Mr. Ramundo has been in his position since 2013 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. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives 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. As noted, each of the 1,105 pages of the CMR attached to the Picard affidavit as Exhibit “A” contains a USPS postmark dated March 3, 2014. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all of the 12,149 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on March 3, 2014.

11. The affidavit of Diane Rynski states that as part of her regular duties she oversees the analysis and testing of computer systems that process tax information, store information derived

from various sources and generate printed documents that are sent to taxpayers, including printouts of purged information. Ms. Rynski states that, in processing a return, the Division captures certain information from the return onto the Returns Processing Database in a record format. She further asserts that she has examined the printout attached to her affidavit and has determined that it is a true and accurate copy of the hard copy personal income tax return filed by petitioner for the tax year 2005, including the address therein of “150-W 88 ST 3B, New York, NY 10024-2430.” That address is the same address used on the notice (*see* finding of fact 1).¹ The attached printout shows a filing date of April 15, 2006 for that return. This was the last return petitioner filed with the Division before the notice was issued.

12. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner’s last known address on March 3, 2014, as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Because the petition was filed by mail and the only postmark date on the envelope containing the petition was made by the United Kingdom’s postal service, the petition is deemed filed on February 6, 2017, when it was received, which is more than 90 days from the date of the conciliation order (*see* findings of fact 3 and 4; Tax Law § 170 [3-a] [e]; 20 NYCRR 3000.22 [f]). However, because the Division has not provided mailing

¹ There are minor differences in the address for petitioner on the printout attached to the Rynski affidavit and the address on the notice: (i) the address shown on the printout has a dash between the house number and street number, which does not appear on the address used on the notice; (ii) the address on the printout does not have “TH” after the street number, while the address on the notice does; and (iii) the address on the printout does not have “Apt.” before the apartment number, while the address on the notice does. These differences are inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

proof to establish when the conciliation order was mailed to petitioner, petitioner's protest of the conciliation order is deemed timely for purposes of this motion. Accordingly, for purposes of this motion, the Division of Tax Appeals has jurisdiction over the petition. It follows that 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 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]).

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 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 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*).

D. 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, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Picard, Ramundo, and Rynski affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden* at 544; *Whelan v GTE Sylvania*).

E. 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 (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, 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 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).

F. Where, as here, 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 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).

G. In this case, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on March 3, 2014. 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 sheet and CMR conforms with the address listed on the transcript of petitioner's 2005 personal income tax return, which, along with the affidavit of Ms. Rynski, satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice on March 3, 2014, 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] [a]; 681 [b]; 689 [b]).

H. Petitioner's request for conciliation conference was filed with BCMS on October 11, 2016. This date falls well after the 90-day period of limitation for the filing of such a request.

Consequently, the request was untimely (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]) and the same was properly dismissed by the October 28, 2016 conciliation order issued by BCMS.

Petitioner has offered no claim or evidence to meet her burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

I. The Division's motion for summary determination is hereby granted, the petition is denied, and the October 28, 2016 conciliation order dismissing petitioner's request for conciliation conference is sustained.

DATED: Albany, New York
July 18, 2019

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE