

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ELAINE H. STANTS</b>	:	DETERMINATION
for Redetermination of Deficiency or for Refund of	:	DTA NO. 830225
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Tax Year 2014.	:	

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Petitioner, Elaine H. Stants, 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 tax year 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated May 7, 2021, 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 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Robert L. Kristel, P.C. (Robert L. Kristel, CPA), filed his response to the Division of Taxation's motion on May 24, 2021. The 90-day period for issuance of this determination commenced on June 7, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

***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***

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 July 15, 2020, and bearing assessment identification number L-051267214 (notice). The notice was addressed to petitioner, Elaine H. Stants, at an address in Placida, Florida. Page 2 of the notice states:

“You have the right to formally protest this notice...(i)f you do not file your formal protest by **October 13, 2020**, the proposed amount due will become assessed and subject to collection actions. If you filed an informal protest of this matter, you must still file your formal protest by this date to preserve your rights” (emphasis in original).

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request is postmarked November 30, 2020 and stamped as received by BCMS on December 2, 2020. The request was accompanied by a fully executed power of attorney form, signed and dated November 19, 2020, designating Robert L. Kristel, CPA, as petitioner's representative for this matter; there is no evidence in the record that petitioner had an earlier power of attorney on file with the Division.

3. On December 24, 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 July 15, 2020, but the request was not mailed until November 30, 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 January 8, 2021.

5. To show proof of proper mailing of the notice, 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 April 20, 2021; (ii) a certified mail register titled, "CERTIFIED RECORD FOR – DTF – 962-F-E – Not of Def Follow Up " (CMR), postmarked July 15, 2020; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated April 20, 2021; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (v) an affidavit of the Division's attorney, Michelle M. Helm, dated May 7, 2021; and, (vi) a copy of the petitioner's electronically filed New York State nonresident and part-year resident income tax return (form IT-203) for the year 2018, which lists the same address for petitioner as that listed on the notice, request, conciliation order and petition, except that petitioner's address on the notice includes an additional four zip code digits to petitioner's five-digit zip code and abbreviates "Alley" to "ALY." According to the affidavit of Ms. Helm, the 2018 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 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 which in this case was "7/15." 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. 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 July 15, 2020 CMR consists of 11 pages and lists 139 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 July 15, 2020 to each page of the CMR, initialed and wrote the number "139" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE".

9. Page 10 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 0028 6801 and assessment ID numbers L-051267214, was mailed to petitioner at the Placida, Florida, 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.

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. In this case, 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 July 15, 2020 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, a copy of the notice was properly mailed to petitioner at her Placida, Florida, address on the date indicated as claimed.

12. On May 24, 2021, petitioner's representative, Robert L. Kristel, CPA, submitted a letter in response to the Division's motion. The letter indicates that Ms. Stants has not been a New York State resident since 2012 and, "(d)uring the year 2014, she was out of New York State for at least 200 days." The letter also states that upon receipt of the notice in July 2020, Ms. Stants contacted the Division on two occasions, July 30, 2020 and August 15, 2020, to discuss the notice and was told that the Division would look into the matter. No affidavits were included in petitioner's May 24, 2021 response.

### ***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). As the petition in this matter was filed within 90 days of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, 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. 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]). 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).

E. Where, as here, the timeliness of a request for conciliation conference 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).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on July 15, 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). 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 conform with the address listed on petitioner's 2018 nonresident income tax return which satisfies the "last known address" requirement. While it is noted that the Division added four additional zip code digits to petitioner's zip code as reflected on her 2018 nonresident income tax return filed, and abbreviated "Alley" to "ALY," such differences are deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). Moreover, petitioner does not contend that the notice was improperly addressed, and confirms her receipt of the notice (*see* finding of fact 12). As such, it is deemed admitted that the address on the notice was petitioner's last known



address. It is thus concluded that the Division properly mailed the notice on July 15, 2020, 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]).

G. Petitioner contends that upon receipt of the notice, she contacted the Division on two occasions to discuss the matter. However, such limited contact does not suffice to qualify as an informal protest of the notice (*see Accidental Husband Intermediary, Inc.*, Tax Appeals Tribunal, April 11, 2019). Since the BCMS conciliation conference request form was not filed until November 30, 2020, or in excess of 90 days from the issuance of the July 15, 2020 notice, petitioner's request for a conciliation conference was properly dismissed by the December 24, 2020 conciliation order issued by BCMS.

H. The Division's motion for summary determination is hereby granted, the petition of Elaine H. Stants is denied and the December 24, 2020 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York  
September 2, 2021

/s/ Nicholas A. Behuniak  
ADMINISTRATIVE LAW JUDGE