

STATE OF NEW YORK

DIVISION OF TAX APPEALS

<hr/>		:
In the Matter of the Petition		:
of		:
MARIA BOYAZNY		:
		:
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 2018.		:
<hr/>		:

DETERMINATION
DTA NO. 831270

Petitioner, Maria Boyazny, 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 2018.

On September 17, 2024, the Division of Taxation, appearing by Amanda Hiller, Esq. (Roy M. Diehl, Esq., of counsel), brought a motion pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The motion seeks an order dismissing the petition or, in the alternative, summary determination in its favor. Petitioner, appearing by Brian D. Levine, CPA, did not file a response by October 17, 2024, which date began the 90-day period for the issuance of this determination.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Alexander Chu-Fong, 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 disallowance.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner Maria Boyazny's protest of a notice of disallowance (notice), dated May 18, 2020, and bearing a "DLN" or identification number of PH1910819302. The notice lists a Sayreville, New Jersey, address for petitioner.

2. On December 1, 2022, petitioner protested the notice by filing a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS).

3. On December 30, 2022, BCMS issued a conciliation order dismissing request (conciliation order), bearing CMS No. 000347706, which dismissed petitioner's request as untimely filed, stating:

"The Tax Law requires that a request be filed within 2 years from the date of the statutory notice. Since the notice(s) was issued on 5/18/2020, but the request was not received until 12/1/2022, or in excess of 2 years, the request is late filed."

4. On March 30, 2023, petitioner protested the conciliation order by filing a petition with the Division of Tax Appeals.

5. To show proof of proper mailing of the notice, the Division, by affirmation of Roy M. Diehl, Esq. (Diehl Affirmation), dated September 17, 2024, submitted copies of the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on June 10, 2024; (ii) a "CERTIFIED RECORD FOR - DTF-170 Adjusted Refund Denial" (CMR), postmarked May 18, 2020; (iii) the notice, dated May 18, 2020, along with the associated mailing cover sheet addressed to petitioner; (iv) an affidavit of Susan Ramundo, a manager of the Division's mail room, sworn to on June 11, 2024; (v) petitioner's request, along

with the conciliation order; and (vi) a copy of petitioner's electronically filed form IT-201, New York State resident income tax return, for the year 2018 (2018 return), filed on October 14, 2019, listing the same Sayreville, New Jersey, address for petitioner as was listed on the notice.¹

6. The Diehl Affirmation states that the 2018 return was the last return filed by petitioner with the Division before the notice was issued. Therefore, Mr. Diehl avers that it represents petitioner's last known address at the time the notice was issued. The Sayreville, New Jersey, address listed on the 2018 return matches the address as listed on the CMR and the notice.

7. Ms. Denier has served as the Director of MAPS since July 2022. Prior to that, she was a supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of disallowance. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices.

8. 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 of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back.

CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its

¹ Although petitioner resided in New Jersey during 2018, she erroneously filed her 2018 return using form IT-201, rather than form IT-203, New York nonresident and part-year resident income tax return.

accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

9. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are listed on the CMR under the heading "CERTIFIED NO." The assessment numbers, Audit Case ID numbers, Case ID numbers, Collection Case ID numbers or Document Locator Numbers (DLN) 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together. 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 after mailing. 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.

10. The CMR for the batch of statutory notices to be issued on May 18, 2020, including the notice addressed to petitioner herein, consists of four cut sheet pages. Each of these pages includes in its upper left corner an initial date that is approximately 10 days in advance of the anticipated mailing date. Appearing in the upper right corner of pages 1 and 4 is the handwritten date "5/18/20." Following the Division's general practice, the initial date on the first and last page of the CMR date was manually changed to ensure that the date on the CMR conformed with the actual date on which the statutory notices and the CMR were delivered into the possession of the United States Post Office (USPS). Each of the foregoing four pages includes a USPS postmark, dated May 18, 2020. Ms. Denier noted that the attached CMR has been

redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

11. Page 1 of the CMR indicates that a notice with certified control number 7104 1002 9735 0004 4685, and reference number PH1910819302, was mailed to petitioner at the Sayreville, New Jersey, address listed on the subject notice. The associated mailing cover sheet, attached to the Denier affidavit with a copy of the notice as exhibit “B,” bears the same certified control number and petitioner’s name and address as noted.

12. Appearing below the certified control number entries on page 4 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” and next to which is the preprinted number “44.” Immediately beneath this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE.” A USPS postmark, dated May 18, 2020, appears on this page, as well as a handwritten number 44 and the initials or signature of a USPS employee.

13. Ms. Denier states that the notice was mailed on May 18, 2020, as indicated by the CMR, as well as the USPS postmark on all the pages of the CMR.

14. Ms. Denier avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on May 18, 2020.

15. Ms. Ramundo, a manager of the Division’s mail room, describes the mail room’s general operations and procedures in her affidavit as they relate to statutory notices. Ms. Ramundo has been a manager of the mail room since 2017. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Ramundo’s official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the USPS.

16. The mail room receives statutory notices 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 into 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.

17. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. 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.

18. Ms. Ramundo avers that each page of the CMR contains a postmark, and that a USPS employee initialed or signed page 4 of the CMR. A review of the CMR confirms Ms. Ramundo’s assertions and further indicates that a USPS employee wrote the number of pieces received on the CMR underneath the heading “TOTAL PIECES AND AMOUNTS RECEIVED AT POST OFFICE.”

19. Ms. Ramundo attests that, based on her review of the Denier affidavit and attached exhibits and her personal knowledge of the mail room procedures, on May 18, 2020, an employee of the mail room delivered to the USPS one piece of certified mail addressed to petitioner at her Sayreville, New Jersey, address in a sealed postpaid envelope for delivery by certified mail. She also states that the CMR delivered to the USPS on May 18, 2020, was returned to the Division. Ms. Ramundo further attests 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 May 18, 2020.

20. Petitioner did not file a response to the Division's motion.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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 issuance of the conciliation order (*see* findings of fact 3 and 4), 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.

B. Section 3000.9 (c) of the Rules provides that the same provisions that apply to a motion for summary judgment, pursuant to CPLR 3212, also apply to a motion for summary determination. 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

Thus, the movant “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]). The Tax Appeals Tribunal has stated:

“Inasmuch 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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989])” (*Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004).

C. To prevail against a motion for summary judgment, the opposing party must produce “‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman v City of New York*, 49 NY2d at 562).

D. Herein, 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 v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner introduced no evidence to contest the facts alleged in the Division’s motion papers. Therefore, the facts introduced by the Division are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

E. The Division's motion raises the issue of the timeliness of petitioner's request. Therefore, the initial inquiry is whether the Division carried its burden of demonstrating proper issuance of the notice by mailing the same, by certified or registered mail, to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which is when it is delivered into the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the date and the fact of mailing of a statutory notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York; see Matter of Katz*).

F. Here, the Division offered documents to prove the mailing of the notice to petitioner. The CMR for notices issued on May 18, 2020, has been properly completed and, therefore, constitutes highly probative documentary evidence of both the date and the fact of the mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Denier and Ramundo affidavits adequately describe the general mailing procedures, as well as the relevant CMR, thereby, establishing that in this case, the Division followed its general mailing procedure (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). This evidence establishes that the Division properly mailed the notice on May 18, 2020.

G. The Division also adduced proof regarding petitioner's last known address. For the purpose of the Division's issuance of statutory notices, the phrase “last known address” has been consistently defined to mean the address given in the last return filed by the taxpayer or in any application made to the Division, or if no return has been filed or application made, then to such

address as may be. Here, petitioner's last known address, as indicated on her 2018 return, was the same Sayreville, New Jersey, address that appears on the subject notice, cover sheet, and CMR. Accordingly, the evidence establishes that on May 18, 2020, the Division mailed the notice to petitioner's last known address. Therefore, petitioner's time frame within which to protest the conciliation order commenced on May 18, 2020 obtainable (*see Matter of Kowalewicz*, Tax Appeals Tribunal, August 15, 2024).

H. A taxpayer may protest a notice of disallowance, such as the one at issue, by filing either a petition with the Division of Tax Appeals, or a request for conciliation conference with BCMS, within two years after the notice's issuance (Tax Law §§ 689 [c], 170 [3-a] [a]; *see Matter of Yoell-Mirel*, Tax Appeals Tribunal, September 21, 2015). Here, the Division issued the notice on May 18, 2020. Petitioner protested the same by filing the request on December 1, 2022. It is concluded that BCMS properly denied the protest as untimely because petitioner failed to file the request during the two-year statutory protest period (*see* Tax Law § 170 [3-a] [a]). Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the underlying merits of petitioner's protest (*see Matter of Lukas*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

I. The Division of Taxation's motion for summary determination is granted, the petition of Maria Boyazny is denied, and the conciliation order dismissing request, dated December 30, 2022, is sustained.

DATED: Albany, New York
January 08, 2025

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE