

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SARAH FORST : ORDER
DTA NO. 850725
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 2020. :

Petitioner, Sarah Forst, 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 2020.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Amanda K. Alteri and Emil N. Kambala), brought a motion on April 1, 2024, seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to Tax Law § 2006 and section 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed a response by May 1, 2024, which date commenced the 90-day period for issuance of this order. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation has established that the petition should be dismissed or that summary determination is warranted on the basis that there are no material and triable issues of fact presented, such that, as a matter of law, a determination can be made in its favor.

FINDINGS OF FACT

1. On May 17, 2021, petitioner, Sarah Forst, filed form IT-203, New York State nonresident and part-year resident income tax return, for the year 2020 (2020 return). In relevant part, petitioner reported unemployment compensation in the amount of \$13,131.00 in both the federal amount and New York State amount columns. On line 16, “[o]ther income,” petitioner subtracted \$10,200.00 in both the federal amount and New York State amount columns. After allocation, petitioner reported New York State tax due in the amount of \$81.00.

2. The Division of Taxation (Division) conducted an audit of petitioner’s 2020 return and determined that petitioner failed to include unemployment compensation received from New York State and recomputed petitioner’s federal adjusted gross income.

3. On May 3, 2022, the Division issued a statement of proposed audit change, bearing assessment ID L-055877363, for the year 2020 asserting that petitioner owes additional tax in the amount of \$425.00, plus interest. The statement of proposed audit change, in part, provided the following explanation:

“We adjusted your **recomputed** federal adjusted gross income (line 19a of Form IT-203) to include unemployment compensation that was excluded from your federal gross income.

Under New York State tax law, unemployment compensation is fully subject to tax. The amount that was excluded on your federal return (up to \$10,200 per taxpayer) should have been reported as an add back to your New York State return on Line 1, Schedule A of Form IT-558.

The adjustments resulted in a change to the income percentage used to calculate your New York tax.

The income percentage is multiplied by the base tax to compute the correct New York tax.

Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684(a) of the Tax Law.”

4. On June 3, 2022, petitioner made an online payment in the amount of \$425.00 for assessment ID L-055877363.

5. On June 22, 2022, the Division issued a notice of deficiency, bearing assessment ID L-055877363 (notice), asserting that petitioner owes tax in the amount of \$425.00, plus interest in the amount of \$34.74, less the \$425.00 payment noted above, for a balance due of \$34.74 for the year 2020.

6. Petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS), which was conducted on June 29, 2023. By conciliation order, CMS. No. 000342485, dated August 11, 2023, BCMS sustained the notice.

7. Petitioner filed a petition with the Division of Tax Appeals on November 13, 2023 protesting the conciliation order. In the petition, petitioner argues that interest was “unfairly incurred” and that “[t]his was a penalty applied to me which I had no control over and would not have occurred if New York notified me immediately, not over a year later.”

8. Accompanying the Division’s motion is the affidavit of Amanda K. Alteri, sworn to April 1, 2024, with attached exhibits. In her affidavit, Ms. Alteri asserts that petitioner is not entitled to protest the statutory interest due on her tax owed for the year 2020 because interest is required under Tax Law § 684 (a) from the due date of the return to the date tax is paid in full.

9. Petitioner filed a response to the Division’s motion. In her response, petitioner states, in part:

“[t]o summarize [the Division’s motion, its] initial statements are correct – the 2020 return, which was filed in good faith but due to confusion regarding the tax implications of unemployment payments, erroneously used the incorrect amounts as taxable to NY. The initial problem was not the error in the return, but that NY did not notify us for over a year and unfairly added interest to the amount owed.”

Petitioner also claims that “reviewing the recent tax return resulted in the awareness that [the Division’s] proposed audit change is not correct.” Petitioner explains that she “received a total of \$13,130 in unemployment compensation. Of that amount, \$3,230 was from NY and the remainder of \$9,900 was federal pandemic unemployment compensation and thus should have only been included on column A.” Taking into consideration the above, as well as the payments she previously made, petitioner believes she is entitled to a refund, plus interest.

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 of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). “A motion to dismiss, rather than a motion for summary determination, is appropriate where . . . the threshold issue is whether a petition has been timely filed with the Division of Tax Appeals”¹ (*Matter of Marrero*, Tax Appeals Tribunal, May 21, 2020).

B. The standard of review on a motion to dismiss is the same as that for summary determination (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). A motion for summary determination is properly 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]).

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

¹ While the Division did not challenge jurisdiction, the Division of Tax Appeals may not confer jurisdiction upon itself and is not precluded from addressing the issue of its own jurisdiction based upon the evidence in the record (*see Matter of Yoell-Mirel*, Tax Appeals Tribunal, September 21, 2015).

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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 v City of New York*, 49 NY2d at 562).

C. Tax Law § 170 (3-a) (e) provides, in pertinent part, that a conciliation order is binding on the taxpayer unless the taxpayer files a petition for a hearing in the Division of Tax Appeals within 90 days after the conciliation order is issued. 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). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

D. Where the timeliness of a taxpayer’s petition following a conciliation order is in question, the initial inquiry focuses on 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). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (*see* Tax Law § 170 [3-a]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*; *Matter of Wilson*). An order is properly mailed when it is delivered into the custody of the United States Postal Service, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

E. The evidence required of the Division to establish proper mailing is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of orders 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 (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. The conciliation order in this matter is dated August 11, 2023. The petition was filed on November 13, 2023. Based on these documents, it appears that the petition is untimely as it was filed more than 90 days after the date of the conciliation order.² The Division did not challenge jurisdiction in its motion and thus did not provide any proof of the mailing of the conciliation order with its motion papers. As such, there remains questions of fact as to the Division’s standard procedures for the issuance of conciliation orders and whether those procedures were followed in this matter. These questions must be resolved before a determination can be made as to whether the conciliation order was properly issued to petitioner

² The 90th day following August 11, 2023 is Thursday, November 9, 2023. In 2023, Veteran’s Day fell on Saturday, November 11th and was, in some instances, observed federally on Friday, November 10th, neither of which affected the last day to timely file a petition in this matter.

on August 11, 2023 and, in turn, whether the Division of Tax Appeals has jurisdiction to address the merits of the petition.

G. The Division of Taxation's motion to dismiss is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York
July 18, 2024

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE