

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ISHAQ ABDULLAH	:	DECISION DTA NO. 827053
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2011.	:	

Petitioner, Ishaq Abdullah, filed an exception to the determination of the Administrative Law Judge issued on June 9, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter Ostwald, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on October 21, 2016, the date that petitioner's reply brief was due.

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

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 for the year 2011.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have made new findings of fact 1 and 2, incorporated former finding of fact 4 into our new finding of fact 1, and renumbered the findings of fact accordingly. These findings of fact are set forth below.

1. On June 27, 2015 petitioner, Ishaq Abdullah, filed a petition with the Division of Tax Appeals in protest of a conciliation order (CMS No. 266430) dated May 22, 2015, issued by the Division's Bureau of Conciliation and Mediation Services (BCMS) dismissing his request for conciliation conference. According to the attached conciliation order, the request was dismissed because it was not filed until May 4, 2015, which date falls after the 90-day period for filing a timely request for a conciliation conference with BCMS following the issuance of the statutory notice (Notice Number L-042212041) on January 7, 2015.

2. The Division of Taxation (Division) filed its answer to the petition on September 30, 2015, asserting that because petitioner failed to request a conciliation conference within the 90-day statutory period, any hearing in this matter must be confined to the issue of the timeliness of petitioner's request. On February 16, 2016, the Division filed a motion to dismiss, or in the alternative, for summary determination.

3. The subject of the Division's motion is thus the timeliness of petitioner's protest of a notice of deficiency dated January 7, 2015 and bearing assessment identification number L-042212041 (the notice). The notice is addressed to petitioner at an address in Brooklyn, New York.

4. Petitioner filed a request for conciliation conference with BCMS in protest of the January 7, 2015 notice. The request was mailed to BCMS on May 4, 2015 and received by BCMS on May 6, 2015.

5. On May 22, 2015, BCMS issued a conciliation order dismissing request to petitioner. The 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 January 7, 2015, but the request was not mailed until May 4, 2015, or in excess of 90 days, the request is late filed.”

6. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit, dated January 25, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked January 7, 2015; (iii) an affidavit, dated January 27, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's mail room; (iv) an affidavit, dated January 29, 2016, of Heidi Corina, a legal assistant in the Division's Office of Counsel; (v) a copy of the notice with the associated mailing cover sheet; and (vi) a replication of petitioner's electronically filed New York State personal income tax return for the year 2013 (form IT-201) filed with the Division on or about March 4, 2014, which lists the same address for petitioner as that listed on the subject notice. The IT-201 was the last return filed with the Division by petitioner before the notice was issued.

7. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 page of the CMR in the present case to the actual mailing date of "1/7/15." In addition, as described by Ms. Nagengast, 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.

8. 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 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."

9. The CMR in the present matter consists of 331 pages and lists 3,637 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 331, which contains 7 entries. Ms. Nagengast 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 January 7, 2015 to each page of the CMR, wrote the number “3637” on page 331 next to the heading “Total Pieces Received at Post Office” and initialed or signed page 331.¹ Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 3,637.

10. Page 116 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0339 2719, and reference number L-042212041 was mailed to petitioner at the Brooklyn, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet attached to the Nagengast affidavit bears this certified control number and petitioner’s name and address as noted.

11. The affidavit of Bruce Peltier, a supervisor in the mail room of the Division since 1999 and currently a mail and supply supervisor, describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier 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 listed on the CMR 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. Here, as

¹ It is observed that many of the postmarks appearing on the 331-page CMR are faint and not legible.

noted, the USPS employee initialed page 331 and affixed a postmark dated January 7, 2015 to each page of the CMR.

12. 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. Here, the USPS employee complied with this request by writing the number “3637” on the last page next to the heading “Total Pieces Received at Post Office.” The affixation of the postmarks and the Postal Service employee’s initials and handwritten number indicate that a total of 3,637 articles of mail listed on the CMR were delivered to the USPS on January 7, 2015.

13. According to the Peltier affidavit, a copy of the notice was mailed to petitioner on January 7, 2015, as claimed.

14. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel, details her filing of USPS form 3811-A (request for delivery information/return receipt after mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0339 2719 on January 7, 2015 from the Albany, New York, branch of the USPS to petitioner at his Brooklyn, New York address. In response, the USPS confirmed delivery of this certified mail item at the noted address on January 9, 2015 at 2:06 P.M.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by noting the provisions providing for accelerated determination under our Rules of Practice and Procedure (Rules). He concluded that because the petition in this matter was filed within 90 days of the issuance of the conciliation

order, the Division of Tax Appeals has jurisdiction over the petition and the motion brought by the Division would be properly treated as a motion for summary determination under our Rules. He then set forth the standard for granting summary determination under our Rules, stating that the standard of review is the same as that for a motion for summary judgment. He next noted that the proponent of summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. The Administrative Law Judge described the case law that establishes the standards for granting summary judgment, noting that a motion for summary judgment should be denied if there is any material fact that is arguable.

The Administrative Law Judge observed that petitioner did not respond to the Division's motion and concluded that petitioner conceded that no question of fact requiring a hearing exists. Having established that petitioner concedes the Division's alleged facts, the Administrative Law Judge then described the 90-day statutory limitation period for filing a petition or request for conciliation conference and the strict enforcement of that limitation period. He concluded that the Division of Tax Appeals lacked jurisdiction over the petition in this matter due to petitioner's late filing and could not consider the merits of the protest.

The Administrative Law Judge reasoned that where the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has demonstrated proper mailing of the statutory notice. The Administrative Law Judge concluded that the Division met its burden of establishing the mailing of the statutory notice to petitioner's last known address. Since the record showed that petitioner's request for a conciliation conference was not filed until May 4, 2015, or more than 90 days after January 7, 2015, petitioner's request was untimely. According to the Administrative Law Judge, because petitioner offered no evidence to meet his burden to prove that a timely protest was filed before

the 90-day period of limitations for challenging the notice expired, the Division's motion for summary determination would be granted.

OPINION

The Administrative Law Judge determined that treating the Division's motion as a motion for summary determination pursuant to section 3000.9 (b) of our Rules would be proper when considering the timeliness of petitioner's request for a conciliation conference (*see* 20 NYCRR 3000.9 [b]). We concur. Here, the petition at issue was filed within 90 days of the conciliation order, therefore the Division of Tax Appeals has jurisdiction over this matter.

Our Rules provide that a summary determination motion "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]). As noted by the Administrative Law Judge, section 3000.9 (c) of our Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant for summary determination "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 [1980]). As we noted in *Matter of United Water New York*:

"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 [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 [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 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a movant 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], quoting *Zuckerman*).

As relevant here, there is a 90-day statutory time limit for filing a petition or a request for conciliation conference following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Accordingly, pursuant to Tax Law § 170 (3-a) (a), the notice of deficiency in this case would be binding upon petitioner unless a timely request for conciliation conference was filed with BCMS.

As noted by the Administrative Law Judge, it is well established that where the timeliness of a taxpayer’s protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We agree with the Administrative Law Judge that the Division has produced adequate

proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices.

We also find that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). Specifically, this document lists certified control numbers and reference numbers with corresponding names and addresses and bears USPS postmarks dated January 7, 2015 on each page. As noted, the name, address, reference and the certified control numbers for petitioner appear on page 116 of the CMR. There are 3,637 pieces of mail listed on the CMR. On the last page of the CMR, a postal employee wrote his or her initials and also wrote “3637” to indicate receipt by the post office of all 3,637 pieces of mail listed thereon, in accordance with the Division’s standard mailing procedure. We also note that the affidavit of Ms. Corina, a Division legal assistant, details her filing of USPS form 3811-A (request for delivery information/return receipt after mailing) and has as an attached exhibit USPS’ confirmation of petitioner’s receipt of the statutory notice in this matter on January 9, 2015. We thus conclude that the Division has presented sufficient documentary proof to establish that the subject notice of deficiency was properly mailed as addressed to petitioner on January 7, 2015.

A protest of a statutory notice must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 6, 2007). As petitioner’s request for conciliation conference was not filed until May 4, 2015, which was beyond the 90-day statutory period, we find that the Division of Tax Appeals has no jurisdiction to consider the merits of the protest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ishaq Abdullah is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Ishaq Abdullah is denied and;
4. The May 22, 2015 conciliation order dismissing petitioner's request for conciliation conference is sustained.

DATED: Albany, New York
April 14, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner