

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
AMADOU O. SOW AND ADAMA CAMARA : DECISION :
 : DTA NO. 829892 :
for Redetermination of a Deficiency or Refund of New :
York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the New York :
City Administrative Code for the Year 2018. :
:

Petitioners Amadou O. Sow and Adama Camara, appearing pro se, filed an exception to the determination of the Administrative Law Judge issued on March 18, 2021. The Division of Taxation appeared by Amanda Hiller, Esq. (Amy Seidenstock, Esq., of counsel).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Petitioners' request for oral argument was denied. The six-month period for issuance of this decision began on May 21, 2021, the date petitioners' reply brief was received.

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

ISSUE

Whether petitioners filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of deficiency for tax year 2018.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 1, 3, and 5, which we have modified for clarity. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) brought a motion seeking dismissal or summary determination of the petition in this matter. The subject of the motion was whether petitioners, Amadou O. Sow and Adama Camara, timely filed a protest of a notice of deficiency dated October 21, 2019 and bearing assessment identification number L-050190110, and addressed to petitioners at an address in Jamaica, New York.

2. Petitioners filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was dated February 10, 2020 and received by BCMS on February 11, 2020.

3. On March 6, 2020, BCMS issued a conciliation order dismissing request to petitioners.¹ The conciliation order determined that petitioners' protest of the subject notice was untimely and stated, in pertinent 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 October 21, 2019 but the request was not received until February 11, 2020, or in excess of 90 days, the request is late filed.”

4. Petitioners filed a petition with the Division of Tax Appeals date stamped March 11, 2020, in protest of the conciliation order dismissing request.

5. As proof of proper mailing of the notice, the Division provided: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's

¹ Petitioners included two letters from BCMS with their petition. The letter dated March 6, 2020, bearing CMS No. 000318933, references the notice here at issue. The other letter, dated February 26, 2020, corresponds to a separate tax matter and will not be addressed in this decision.

Management Analysis and Project Services Bureau (MAPS), dated October 7, 2020; (ii) a certified mail register titled: “CERTIFIED RECORD FOR – DTF –962-F-E-Not of Def Follow Up” (CMR) postmarked October 21, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division’s mail room dated October 15, 2020; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioners; (v) an affidavit of the Division’s attorney, Amy Seidenstock, dated November 18, 2020; and, (vi) a copy of petitioners’ e-filed New York State personal income tax return (form IT-201) for the year 2018, which lists the same address for petitioners as that listed on the notices, except that petitioners’ address on the notice includes an additional four zip code digits to petitioners’ five-digit zip code and the address on the notice did not include a hyphen between the address numbers that were reflected in the address on the return, i.e., 134-17 on the return was reflected as 13417 on the notice. According to the affidavit of Amy Seidenstock, the 2018 income tax return, filed on February 9, 2019, was the last return filed with the Division by petitioners before the notice was issued. The Division also provided with its motion papers a printout from the United States Postal Service (USPS) website, entitled “Look Up A Zip Code,” which reflects petitioners’ Jamaica, New York, address, with the house number “13417” and the zip code “11434-3725.” The USPS verified address is the address to which the notice was mailed.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal System 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 a 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 a CMR to the actual date of mailing, in this instance to "10/21/19." 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 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 Department return address on the front, and tax payer 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 P.O. ADDRESS."

8. The October 21, 2019 CMR consists of one page and lists 10 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard noted that the copy of the CMR has been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in the proceeding. A USPS representative affixed a postmark, dated October 21, 2019 next to the CMR, initialed and wrote and circled the number "10" next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE."

9. The CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 5211 0161 and assessment ID number L-050190110, was mailed to petitioners at the Jamaica, New York address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioners’ name and address as noted.

10. The affidavit of Susan Saccoccio describes the general operations and procedures of the Division’s mail room. Ms. Saccoccio 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. Saccoccio confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheet 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. The USPS employee here initialed the CMR and affixed the postmark to 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 October 21, 2019 CMR indicates that the USPS employee complied with this request by writing and circling the number of pieces received on the CMR.

11. According to the affidavits submitted, a copy of the notice was properly mailed to petitioners at their Jamaica, New York address on the date indicated as claimed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by noting that the Division brought a motion to dismiss the petition or, in the alternative, a motion for summary determination. He first determined that a motion for summary determination is the proper vehicle to consider the timeliness of petitioners' request for conciliation conference and reviewed the standards for the granting of such a motion. The Administrative Law Judge noted that the petition was brought within 90 days of the conciliation order and accordingly, the Division of Tax Appeals had jurisdiction over the petition.

The Administrative Law Judge noted that a motion for summary determination is subject to the same provisions as a motion for summary judgment under the CPLR and described the burden of proof of the moving party as tendering sufficient evidence to establish there is no material and triable issue of fact presented. If material facts are in dispute, then a full trial is warranted and the motion should not be decided on a motion. However, the Administrative Law Judge stated that the opponent to a motion for summary determination must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.

The Administrative Law Judge further noted that petitioners did not respond to the Division's motion. Thus, according to the Administrative Law Judge, petitioners are deemed to have conceded that no question of fact requiring a hearing exists. In addition, because petitioners presented no evidence to contest the facts alleged in the affidavits attached to the Division's motion, those facts were deemed admitted.

The Administrative Law Judge then noted the 90-day time limit in which a taxpayer must protest a notice of deficiency by filing for a hearing with the Division of Tax Appeals. He noted that alternatively a taxpayer may, within the same time period, contest a notice by filing a request for a conciliation conference with BCMS. The Administrative Law Judge explained that a petition or request for conciliation conference filed even one day late is barred because absent a timely protest, the notice of deficiency becomes a fixed and final assessment, and the Division of Tax Appeals is without jurisdiction to consider the substantive arguments raised.

Turning to the dispute at issue, the Administrative Law Judge noted that when the timeliness of a request for a 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 petitioners' last known address. He cited case law holding that the Division can meet its burden by showing proof of a standard procedure for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedures were followed in the instant case.

The Administrative Law Judge determined that the Division offered sufficient proof of mailing to petitioners' last known address on October 21, 2019. He found that the CMR was properly completed, which constitutes highly probative evidence of the date and fact of mailing. He noted the affidavits adequately described the Division's general mailing procedure as well as the relevant CMR and established that the general mailing procedures were followed. Finally, the Administrative Law Judge noted that the address on the mailing cover sheet and CMR conform with the address listed on petitioners' 2018 personal income tax return, thus satisfying the "last known address" requirement.

The Administrative Law Judge thus concluded that the Division properly mailed the notice on October 21, 2019, and the statutory time limit commenced on that date and therefore the February 11, 2020 filing of a request for a BCMS conciliation conference was untimely and the Division of Tax Appeals was without jurisdiction to hold a hearing to consider the substantive merits of the notice. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination, denied the petition and sustained the March 6, 2020 conciliation order dismissing petitioners' request.

ARGUMENTS ON EXCEPTION

Petitioners contend that the Division has not shown proof of their receipt of the Division's notice at the Jamaica, New York address and that without such proof of receipt, the Division's mailing is insufficient.

The Division argues that the Administrative Law Judge correctly determined that petitioners' request for a conciliation conference was untimely and thus summary determination in the Division's favor was proper.

OPINION

As an initial matter, we note that the Administrative Law Judge correctly held that the proper procedure for consideration of the matter was a motion for summary determination pursuant to 3000.9 (b) (1) of the Tax Appeals Tribunal Rules of Practice and Procedure (Rules), which provides that such a motion may 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."

A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (*see* 20 NYCRR 3000.9 [c]). “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 a material issue of fact is arguable (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004). 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 (*see Gerard v Inglese*, 11 AD2d 381 [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*).

The central issue is whether the Division properly mailed a notice of deficiency for tax year 2018 pursuant to the statutory requirements set forth in Tax Law § 681, which authorizes the Division to mail a notice of deficiency by certified or registered mail to the taxpayer at his last known address if it determines that there is a deficiency of income tax. 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 the date of mailing of such notice (Tax Law §§ 681 [b]; 689 [b]).

Alternatively, taxpayer may contest a notice by filing a request for 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, a protest filed even one day late is considered untimely (*see e.g. Matter of Am. 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).

The Administrative Law Judge correctly stated that where timeliness of the filing of a protest is at issue, the initial inquiry is determining whether the Division has met its burden of showing the date and fact of mailing of the statutory notice (*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 Furn.*, Tax Appeals Tribunal, November 25, 1992). This requires that the Division show proof of its standard mailing procedure and proof that such procedure was followed in that particular instance in order to meet its burden of proving proper mailing (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). Actual receipt of the notice is unnecessary; if it is mailed to the taxpayer's last known address, it is adequate for the purposes of the statute (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019). Here, we agree with the Administrative Law Judge that the CMR and affidavits presented by the Division were sufficient to establish its standard mailing procedure and that the notices were mailed to the Jamaica, New York address as claimed.

Indeed, petitioners do not contend that the Division failed to follow proper mailing procedures or failed to mail the notice, nor do petitioners contend that the notice was improperly

addressed. Further, petitioners did not respond to the Division’s motion for summary determination before the Administrative Law Judge, and therefore are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]).

Petitioners’ contention is limited to the argument that the Division has offered no proof that the notice was received by petitioners at the Jamaica address. Specifically, they contend “[t]he Department of Taxation did not deliver the letter asking for proofs . . . to the [Jamaica, New York] address” and that the Division “is without showing any delivery itinerary of that ‘letter’” (referring to the notice of deficiency). However, as noted, there is no requirement in the law that the Division establish receipt of a notice of deficiency, only that it establishes its mailing (*see* Tax Law §§ 681, 689 [b]; *Matter of Olshanetskiy*). Because the record amply establishes that the Division offered sufficient proof of its mailing and because petitioners are deemed to have conceded that no question of fact exists, petitioners’ exception is without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Amadou O. Sow and Adama Camara is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Amadou O. Sow and Adama Camara is denied; and
4. The conciliation order dismissing request dated, March 6, 2020, is sustained.

DATED: Albany, New York
November 18, 2021

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner