

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JAIMAINE AND CRYSTAL RATCLIFF : DECISION :
for Redetermination of a Deficiency or for Refund of : DTA NO. 830790 :
Personal Income Tax under Article 22 of the Tax Law and :
the New York City Administrative Code for the Year 2017. :
:

Petitioners, Jaimaine and Crystal Ratcliff, filed an exception to the determination of the Administrative Law Judge issued on September 22, 2022. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel). Petitioners filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioners did not file a reply brief. Neither party requested oral argument. The six-month period for the issuance of this decision began on January 11, 2023, the due date for petitioner’s reply brief.

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

ISSUE

Whether petitioners 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

We find the facts as determined by the Administrative Law Judge, except for finding of fact 1, which we have modified to reflect the record more fully. As so modified, the

Administrative Law Judge's findings of fact appear below.

1. The Division of Taxation (Division) brought a motion, dated May 26, 2022, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). The subject of the Division's motion is the timeliness of petitioners' protest of a notice of deficiency, dated April 5, 2021, and bearing assessment identification number L-052178109 (notice). The notice was addressed to petitioners, Jaimaine and Crystal Ratcliff, at an address in Fresh Meadows, New York.

2. Petitioners filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice on September 21, 2021.

3. On October 8, 2021, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation order determined that petitioners' 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 4/05/21, but the request was not received until 9/21/21, or in excess of 90 days, the request is late filed.”

4. Petitioners filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on December 6, 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 May 4, 2022; (ii) a certified mail register titled: “CERTIFIED RECORD FOR – DTF – 962-F-E – Not of Def

Follow Up” (CMR) postmarked April 5, 2021; (iii) an affidavit of Susan Ramundo, a manager in the Division’s mail room, dated May 6, 2022; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioners; (v) an affirmation of the Division’s attorney, Jennifer L. Hink-Brennan, dated May 26, 2022; and (vi) a copy of the petitioners’ electronically filed New York State personal income tax return (form IT-201) for the year 2020, filed on March 23, 2021, which lists the same address for petitioners as that listed on the notice, except that petitioners’ address on the notice includes an additional four zip code digits to petitioners’ five-digit zip code. According to the affirmation of Ms. Hink-Brennan, the 2020 income tax return was the last return filed with the Division by petitioners 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, indicated by Julian day of the year and military time of day of “20210890635.” 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 of “4/5/21.” 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 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 P.O. ADDRESS."

8. The April 5, 2021 CMR consists of 41 pages and lists 511 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 April 5, 2021 to each page of the CMR, initialed and wrote the number "511" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE."

9. Page 15 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 8557 9106 and assessment ID number L-052178109 was mailed to petitioners at the Fresh Meadows, 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 Ramundo describes the general operations and procedures of the Division's mail room. Ms. Ramundo 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. Ramundo 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. 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 April 5, 2021 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, the notice was properly mailed to petitioners at their Fresh Meadows, New York, address on the date indicated as claimed.

12. Petitioners argued in their response to the Division's motion that they have actively protested the assessment and contacted the Division by telephone on April 19, 2021. However,

petitioners presented no evidence to show that they filed a protest with BCMS prior to September 21, 2021.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that a motion for summary determination was the proper procedure for relief under the present circumstances. She observed that such a motion should be granted if it has been sufficiently established that no material and triable issue of fact is presented and that, as a matter of law, a determination should be issued in either party's favor.

Next, the Administrative Law Judge observed that where the timeliness of a taxpayer's request for conciliation conference is in question, the Division must first demonstrate the fact and date of the mailing of the relevant statutory notice or notices to the taxpayer's last known address. The Administrative Law Judge noted that the Division can meet this burden by showing that it has a standard mailing procedure for the issuance of such notices by one with knowledge of the relevant procedures and that the procedure was followed in this instance. The Administrative Law Judge found that the Division met its burden in this case and determined that the Division properly mailed the subject notice of deficiency on April 5, 2021. The Administrative Law Judge also found that petitioners presented no evidence that they filed a protest with BCMS within 90 days from the date of the notice. She thus concluded that petitioners' request for conciliation conference was untimely filed and that the petition herein must be denied.

ARGUMENTS ON EXCEPTION

Petitioners continue to argue that they actively protested the assessment from the moment the notice was received. They claim that they requested an appeal by fax in May 2021.

Petitioners included several documents with their exception. Some of these documents were previously submitted with their petition or with their response to the Division's motion. Some were not previously submitted. Among the documents not previously submitted but included with petitioners' exception was a copy of a request for conciliation conference dated May 21, 2021 in protest of the notice of deficiency at issue.

The Division contends that it established proper mailing of the subject notice on April 5, 2021 and that petitioners have not shown that they timely filed a request for conciliation conference or petition in protest thereof. The Division thus contends that the Administrative Law Judge properly granted its motion and properly denied the petition.

OPINION

As 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 (*see* Tax Law §§ 170 [3-a], 2006 [4]). As the Administrative Law Judge correctly concluded, a summary determination motion is the proper procedure for an accelerated determination under such circumstances (*see* 20 NYCRR 3000.9). Such a 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]).

A summary determination motion is subject to the same rules as a summary judgment motion under CPLR 3212 (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 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 Village 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, and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

The Division may issue a notice of deficiency “[i]f, upon examination of a taxpayer’s return [the Division] determines that there is a deficiency of income tax” (Tax Law § 681 [a]). 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 (*see* Tax Law §§ 681 [b]; 689 [b]) or 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]). This 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). Absent a timely protest, a notice of deficiency becomes an assessment subject to collection and, consequently, the Division of Tax Appeals is without jurisdiction to consider the 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; Tax Law § 681 [b]).

Where, as here, the timeliness of the filing of a petition or request for BCMS conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing of the relevant statutory notice to petitioner's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *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). To meet its burden, the Division must show proof of a standard mailing procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and proof that the standard procedure was followed in this particular instance (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Where a notice of deficiency of personal income tax is properly mailed, it is valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019).

We agree with the Administrative Law Judge that the Division's proof establishes that notice of deficiency L-052178109 was mailed by USPS certified mail to petitioners' last known address on April 5, 2021. 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). Additionally, the affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant

CMR and also show 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 sheets and CMR matches the address on petitioner's 2020 personal income tax return, thus satisfying the "last known address" requirement. The Division's use of USPS's Zip + 4 routing code is consistent with proper mailing (*see* finding of fact 5; *Matter of Hulteen*, Tax Appeals Tribunal, September 29, 2022).

We also agree with the Administrative Law Judge's conclusion that petitioners presented no evidence to show that they filed a timely request for conciliation conference with BCMS within 90 days from the date of issuance of the notice. Upon review, the documents submitted by petitioners with their petition and in opposition to the Division's motion do contain correspondence from petitioners to the Division. However, none of those documents bear a date that falls within the 90-day period of limitations for filing a request for conciliation conference with respect to the April 5, 2021 notice of deficiency (i.e., between April 5, 2021 and July 5, 2021). Accordingly, without more, none of the documents so submitted could be construed as a *timely* protest of the notice.¹ Finally, we note that petitioners' asserted telephone contact with the Division on April 19, 2021 is irrelevant to the issue of a timely protest because a request for conciliation conference or a petition must be in writing (*see Matter of Tsoumas*, Tax Appeals Tribunal, June 15, 2017).

Petitioners offered documents with their exception that were not part of the record before the Administrative Law Judge. As noted, one of the documents so offered purports to be a copy

¹ The documents in the record also include correspondence from petitioners to the Division dated prior to the issuance of the statutory notice. Even if such correspondence could be construed as a request for conciliation conference or petition, any protest filed before the issuance of a notice of deficiency or determination must be dismissed as premature (*see Matter of Townley*, Tax Appeals Tribunal, January 25, 2018).

of a request for conciliation conference protesting the subject notice of deficiency dated May 21, 2021. This Tribunal has consistently held that “a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end . . . [citations omitted]” (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *confirmed sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*, 116 AD3d 1176 [3d Dept 2014]). In accordance with this principle, we have long and consistently maintained a policy against considering evidence that was not made part of the record below (*see e.g. Matter of Boniface*, Tax Appeals Tribunal, June, 30, 2022; *Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Accordingly, we do not consider the documents newly offered by petitioners with their exception.

While petitioners’ situation is unfortunate, they may not be entirely without recourse. They may pay the disputed liability and file a timely claim for a refund (Tax Law § 687 [a]). If the refund claim is denied, they may timely file a petition in the Division of Tax Appeals to contest the denial (Tax Law § 689 [c]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jaimaine and Crystal Ratcliff is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jaimaine and Crystal Ratcliff is denied; and
4. The conciliation order, dated October 8, 2021, is sustained.

Dated: Albany, New York
June 2, 2023

/s/ Anthony Giardina
Anthony Giardina
President

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

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