

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
AHMAD ALLAHAM A/K/A AHMED ALLAHAM AND SHAHIRA DAHABI	:
	DETERMINATION
	DTA NO. 829573
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 2017.	

Petitioners, Ahmad Allaham and Shahira Dahabi, filed a petition 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 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), filed a motion on May 8, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on June 8, 2020. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

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.

FINDINGS OF FACT

1. On May 8, 2020, the Division of Taxation (Division) brought a motion dated May 6, 2020 for dismissal of the petition, or in the alternative, for summary determination in its favor.¹ The subject of the Division's motion is the timeliness of petitioners' protest of a notice of deficiency, dated January 3, 2019, and bearing assessment identification number L-048766755 (notice). The notice is addressed to petitioners, Ahmad Allaham and Shahira Dahabi, at an address in Brooklyn, New York.

2. On August 5, 2019, petitioners, via their then-representative, Yehad Abdelaziz, faxed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On August 23, 2019, 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 January 3, 2019 but the request was not received until August 5, 2019, 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

¹ The motion in this matter consists of numerous unbound pages. None of the exhibits “attached” to the affidavits are in fact attached to the respective affidavits or otherwise bound. Such poor organization makes it very difficult for a party to present a compelling case and, on occasion may result in the return of a motion as indecipherable.

conciliation order on September 14, 2019.² Attached to the petition is a copy of a statement of proposed audit changes dated September 19, 2018, bearing assessment identification number L-876675504, and two requests for conciliation conference signed as dated on October 15, 2018 and December 12, 2018 sent to BCMS. Both of these requests reference notice L-048766755. By letter dated December 28, 2018, BCMS rejected these requests explaining that a statement of proposed audit changes does not confer formal protest rights.

5. In support of the motion and to show proof of proper mailing of the notice, the Division submitted the following with its motion papers: (i) an affidavit, sworn to April 15, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for – DTF-962-E – Not of Deficiency- DTF-962-F-E –Not Def Follow Up DTF-963-E – Notice of Determination" (CMR) postmarked January 3, 2019; (iii) an affidavit, sworn to on April 20, 2020, of Susan Saccocio, a manager in the Division's mail room; (iv) copies of the notice mailed to petitioners with the associated mailing cover sheets; and (v) a copy of petitioners' e-filed 2017 New York state resident income tax return, form IT-201, filed on January 29, 2018, which was the last return filed with the Division before the notice was issued. The address on the return lists the same Brooklyn, New York, address as listed on the notice, the request for conciliation conference and the petition.

6. The affidavit of Deena Picard, who has been in her current position since February 2006, and Acting Director since May 2017, sets forth the Division's general practice and

² The petition lists Yehad Abdelaziz as petitioners' representative. Petitioners and Mr. Abdelaziz were notified by letter, dated October 24, 2019, that Mr. Abdelaziz is not qualified to represent petitioners in proceedings before Administrative Law Judges in the Division of Tax Appeals (see 20 NYCRR 3000.2 [a] [2]).

In addition, the petition spells Mr. Allaham's first name as "Ahmed" rather than "Ahmad." The spelling "Ahmad" is consistent with petitioner's 2017 New York State personal income tax return, the notice of deficiency and petitioner's request for conciliation conference.

procedure for processing statutory notices. Ms. Picard is the Acting 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 pages of the CMR in the present case to the actual mailing date of "1/3/19." 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 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 PO Address."

8. The CMR in the present matter consists of 244 pages and lists 2,865 certified control numbers along with corresponding assessment numbers, names and addresses.³ Ms. Picard notes

³ Ms. Picard avers that each page of the CMR includes 13 to 15 such entries with the exception of page 244, which contains 8 entries. Careful review, however, indicates that each page of the CMR includes 9 to 15 such

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 3, 2019, to each page of the CMR, wrote the number “2865” on page 244 next to the preprinted “2865” and the heading “Total Pieces and Amounts,” and initialed or signed page 244.

9. Page 136 of the CMR indicates that a notice with certified control number 7104 1002 9735 4676 2154 and reference number L 048766755 was mailed to petitioners at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioners’ name and address as noted.

11. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces 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. A USPS employee affixes a postmark and also places his or her initials or

entries except for page 244. Ms. Picard’s misstatements is inconsequential as the best evidence of what is contained on the CMR is the CMR itself.

signature on the CMR, indicating receipt by the post office. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of January 3, 2019. On page 244, the postal service clerk wrote 2,865 to indicate 2,865 pieces of mail were received by the USPS. There is a set of initials or a signature on page 244.

12. According to the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioners on January 3, 2019, as claimed.

CONCLUSIONS OF LAW

A. The Division brings a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Because the petition in this matter was filed within 90 days of the conciliation order, 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 petitioners’ requests for conciliation conferences.

B. 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” (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 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 Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). “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*). Petitioners did not respond to the Division’s motion. Accordingly, they are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Std. Metals*, 99 AD2d 227 [1st Dept 1984] *lv dismissed* 62 NY2d 942 [1984])

C. 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, a taxpayer may contest a notice of deficiency 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]). 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, protests filed even one day late are considered untimely (*see e.g. Matter of American 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 merits of the protest (*see* Tax Law § 681 [b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where the timeliness of a petition or request for conciliation conference is at issue,

the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified mail of the subject statutory notice to petitioners' last known address (*see* Tax Law § 681 [a]; *see also* *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject 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*, Tax Appeals Tribunal, April 1, 2004; *see* *Matter of Katz*).”

E. The Division has offered sufficient proof to establish the mailing of the statutory notice to petitioners' last known address on January 3, 2019. 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). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish 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 sheet and on the CMR conform with the address listed on petitioners' New York State income tax return for the year 2017, which satisfies the “last known address” requirement in Tax Law § 681 (a).

F. It is concluded that the notice was properly mailed to petitioners on January 3, 2019, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). To the extent it could be argued that petitioners' two requests for a conciliation conference sent to BCMS prior to January 3, 2019 act to convey formal protest

rights, this assertion is rejected; petitioners' disagreement with the amounts proposed in the statement of proposed audit changes was made before the notice of deficiency was issued. The critical time period in this case began on January 3, 2019, the date the notice was issued, and ended on April 3, 2019, the date by which a protest of the notice was required to be filed. At no time during this 90-day time period did petitioners file any written document that could be construed to be a petition for hearing or a request for conference. It is well settled that a petition (or request for conciliation conference) filed before issuance of a notice of determination or a notice of deficiency cannot function as a petition of the notice (*see Matter of West Mountain Corp. v Dept. of Taxation and Fin.*, 105 AD2d 989 [3d Dept 1984], *affd* 64 NY2d 991 [1985]). The Tax Appeals Tribunal has held that where a petition is filed before a notice of deficiency has been issued, "[r]eview by the Division of Tax Appeals would be premature and meaningless if the Division of Taxation's assessment was only a proposed one, subject to change under the internal procedures within the Division of Taxation" (*Matter of Yegnukian*, Tax Appeals Tribunal, March 22, 1990).

Petitioners' request was filed on August 5, 2019. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the September 6, 2019 order issued by BCMS. Petitioners have offered no claim or evidence to meet their burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

G. The Division of Taxation's motion is granted and the petition of Ahmad Allaham and Shahira Dahabi is hereby dismissed.

DATED: Albany, New York
September 3, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE