

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAFEEK M. KASSIM AND FAIZAH M. SAAD : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 829579
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 2016. :

Petitioners, Rafeek M. Kassim and Faizah M. Saad, 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 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel), brought a motion on December 18, 2019, 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's motion.¹ The 90-day period for issuing this determination was extended until July 16, 2020 for good cause pursuant to Tax Law § 2010 (3). 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.

¹ The petition lists Yehad Abdelaziz as petitioners' representative. Although Mr. Abdelaziz was granted special permission to represent petitioners at the Bureau of Conciliation and Mediation Services (BCMS), he is not qualified to represent petitioners at the Division of Tax Appeals and both he and petitioners were informed of this by letter dated October 10, 2019 (*see* Tax Law § 2014 [1]).

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. The Division of Taxation (Division) brought a motion dated December 18, 2019 for dismissal of the petition, or in the alternative, for summary determination in its favor. 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-048769614 (notice). The notice is addressed to petitioners, "Kassim-Rafeek M Saad-Faizah M," at an address in Brooklyn, New York. A notice and demand for payment of tax due was issued to petitioners on April 19, 2019, bearing the same assessment identification number as the notice, and addressed to the same Brooklyn, New York, address as the notice.

2. On August 5, 2019, petitioners, via their then-representative Yehad Abdelaziz, filed 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 conciliation order on September 24, 2019.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affidavit of Michael Trajbar, sworn to on December 17, 2019, the following with its motion papers: (i) an affidavit, dated December 13, 2019, 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-F-E-Not of Def Follow Up DTF-963-E- Notice of Determination DTF-963-F-E-Not of Det Follow Up" (CMR) postmarked January 3, 2019; (iii) an affidavit, dated December 16, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the notice mailed to petitioners; (v) a copy of petitioners' request for conciliation conference, faxed to BCMS on August 5, 2019; (vi) a copy of the conciliation order issued by BCMS on August 23, 2019; and (vii) a copy of petitioners' 2017 New York state resident income tax return, form IT-201, filed on January 31, 2018. The tax return filed on January 31, 2018 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 February 2006 and Acting Director since May 2017, sets forth the Division's general practice and 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 2865 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 10 to 13 such entries with the exception of page 244, which contains 4 entries. Ms. Picard 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 3, 2019, to each page of the CMR, wrote the number “2865” on page 244 next to the heading “Total Pieces and Amounts,” and initialed or signed page 244.

9. Page 151 of the CMR indicates that a notice with certified control number 7104 1002

9735 4676 3953 and reference number L-048769614 was mailed to petitioners at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, also attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioners’ name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room, describes the mail room’s general operations and procedures. Mr. Ramundo has been in this position since 2013 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. Mr. Ramundo 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 signature on the CMR, indicating receipt by the post office. 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. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of January 1, 2019. On page 244, corresponding to “Total Pieces and Amounts,” is the preprinted number “2,865” and next to that is the handwritten entry “2865.” There is a set of initials or a signature on page 244.

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

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 (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As 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 petitioner's request for conciliation conference. This determination shall address the instant motion as such.

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]).

C. 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 v Tri-Pac Export Corp.*, 22 NY2d 439 [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 [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*).

D. 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 v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioners have presented no evidence to contest the facts alleged in the Picard and Ramundo affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. 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).

F. Where, as here, 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 (Tax Law § 681 [a]; *see 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*).”

G. The Division has offered proof sufficient 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).

H. 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]). 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 August 23, 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.

I. The Division's motion for summary determination is granted, the petition of Rafeek M. Kassim and Faizah M. Saad is denied, and the August 23, 2019 conciliation order dismissing petitioners' request is sustained.

DATED: Albany, New York
July 9, 2020

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE