

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

---

In the Matter of the Petition :  
of :  
**ABDELELAH ABDELHAMID** :  
**AND** : **DETERMINATION**  
**IMAN MOHAMED** : **DTA NO. 829583**  
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, Abdelelah Abdelhamid and Iman Mohamed, 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), brought a motion, dated May 6, 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) (i) 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 motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference filed by petitioners, Abdelelah Abdelhamid and Iman Mohamed, protesting a notice of deficiency, dated January 3, 2019, and bearing assessment ID number L-048793154 (notice). The notice is addressed to “ABDELHAMID-ABDELELAH M [and] MOHAMED-IMAN I” at an address in Brooklyn, 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. The request was faxed by petitioners to BCMS on August 5, 2019. In their request, petitioners did not deny receipt of the notice.

3. On August 23, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order (CMS No. 000313449) 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 petition with the Division of Tax Appeals in protest of the conciliation order. The petition was filed United States Postal Service (USPS) priority mail, and bears a USPS postmark dated September 24, 2019. There is no dispute that the petition was timely filed.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit of Mary Hurteau, Esq., dated May 6, 2020; (ii) an affidavit, dated April 15, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a document entitled, in part, "Certified Record for DTF-962-F-E - Not of Def Follow Up" (CMR) postmarked January 3, 2019; (iv) an affidavit, dated April 20, 2020, of Susan Saccocio, a supervisor in the Division's mail room; (v) a copy of the January 3, 2019 notice with the associated mailing cover sheet; (vi) a copy of petitioner's request, faxed to BCMS on August 5, 2019; and (vii) a copy of petitioners' 2017 IT-201 New York State resident income tax return, filed on March 1, 2018, which lists the same Brooklyn, New York, address for petitioners as that listed on the notice, the request for conciliation conference, and the petition. The 2017 income tax return was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006, and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. Each page of the CMR lists an initial date ("run date") in the upper left corner 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 the 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. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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. 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. According to Ms. Picard, each page of the CMR includes 11 such entries, with the exception of page 244, which includes 4 entries.<sup>1</sup> 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.

---

<sup>1</sup> Ms. Picard avers that each page of the CMR includes 11 to 13 such entries with the exception of page 244, which contains 4 entries. Careful review, however, reveals that each page of the CMR includes 9 to 13 such entries except for page 244, which contains 4 such entries (*see e.g.* CMR page 4, which includes 10 entries, and CMR page 7, which includes 9 entries). Ms. Picard’s misstatement is inconsequential in this instance. The best evidence of what is contained on the CMR is the CMR itself. Careful review of the CMR reveals that it consists of 244 pages and lists 2865 certified control numbers, including the item pertaining to petitioners herein, and is properly completed as detailed (*see* findings of fact 9 and 10).

9. A USPS representative affixed a postmark dated January 3, 2019 to each page of the CMR, handwrote “2,865 pcs” and “244 pgs,” respectively, on page 244, next to the headings “Total Pieces and Amounts” and “Total Pieces Received at Post Office,” and affixed and circled his or her initials on page 244 immediately to the right of those headings.

10. Page 136 of the January 3, 2019 CMR indicates that a notice with certified control number 7104 1002 9735 4676 2185 and reference number L-048793154 was mailed to petitioners at the Brooklyn, New York, address listed on the notice. The CMR and the corresponding mailing cover sheet attached to the Picard affidavit bear this same certified control number and petitioners’ name and address as noted.

11. The affidavit of Susan Saccocio describes the general operations and procedures in the Division’s mail room. Ms. Saccocio has been in her position as a manager in the Division’s mail room since 2017, and has been employed in the mail room since 2012. As a result, Ms. Saccocio 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. A staff member retrieves the notices and mailing cover sheets, operates a machine that puts each notice and mailing cover sheet into a windowed envelope, and then weighs, seals and places postage on each envelope. A mail processing clerk checks the first and last pieces of mail against the information on the CMR, and also 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 mail room staff member then delivers the envelopes and the CMR to one of the various USPS branch offices 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 Division further requests, as part of its standard mailing procedure, that the USPS employee

either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. According to Ms. Saccocio, the affixation of the USPS postmark on each page of the CMR and the USPS employee's handwritten number "2,865" on the last page of the CMR, together with the employee's affixation and circling of his or her initials on that page (page 244), indicate that all of the 2,865 articles of mail listed on the CMR, including the article addressed to petitioners, were received by the USPS for mailing on January 3, 2019.

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

13. Petitioners did not respond to the Division's motion.

#### ***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 of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Because the petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 4), 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, 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]). 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’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

D. 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 date of mailing of such notice (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice 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 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).

E. Where, as here, the timeliness of a request for conciliation conference or a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure it uses for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. Here, the Division has offered proof sufficient to establish the mailing of the 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 CMR conforms with the address listed on petitioners' 2017 resident income tax return, which satisfies the "last known address" requirement. It is therefore concluded that the Division properly mailed the notice 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 (*see* Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioners' request for conciliation conference, filed on August 5, 2019, was therefore untimely and was properly dismissed by BCMS.

G. The Division's motion for summary determination is granted, the petition of Abdelelah Abdelhamid and Iman Mohamed is denied, and the August 23, 2019 conciliation order issued by BCMS is sustained.

DATED: Albany, New York  
September 3, 2020

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE