

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
FADHL AWADH AND NOOR YAHIA
for Redetermination of a Deficiency or for Refund of
New York State and New York City Personal Income
Tax under Article 22 of the Tax Law and the
Administrative Code of the City of New York
for the Year 2015.

: DETERMINATION
: DTA NO. 829646

Petitioners, Fadhil Awadh and Noor Yahia, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2015.¹

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel), brought a motion dated August 12, 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 (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 September 10, 2020. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo,

¹ The petition lists Yehad M. Abdelaziz, as petitioners’ representative. In the petition, Mr. Abdelaziz asserts authority to represent the petitioners as their “TAX PREPARER” with no other professional designation claimed to justify his authority to represent petitioners. By way of a letter dated November 14, 2019, the petition intake unit of the Division of Tax Appeals informed petitioners that Mr. Abdelaziz did not qualify to represent them before the Division of Tax Appeals unless additional measures were taken. There was no additional correspondence from either petitioners or Mr. Abdelaziz to the Division of Tax Appeals with regard to this issue.

Administrative Law Judge, renders the following determination.

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

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of a notice of deficiency dated January 3, 2019, and bearing assessment identification number L-048770070 (notice). The notice was addressed to petitioners, Yahia-Noor A and Awadh-Fadhl, 296 Broadway, Brooklyn, New York 11211-6215. A copy of the notice was addressed to Awadh-Fadhl and Yahai-Noor A, 296 Broadway Apt 1, Brooklyn, New York 11211-6215.

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 by way of facsimile on August 5, 2019. The request includes a fax machine date and time stamp indicating that the faxed transmission of the request was completed on August 5, 2019 at 5:49 p.m.

3. On August 30, 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 October 3, 2019.

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 July 30, 2020; (ii) a certified mail register titled:

“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 of Susan Saccocio, a manager in the Division's mail room, dated July 30, 2020; (iv) a copy of the notices with the associated mailing cover sheets addressed to petitioners; (v) an affidavit of the Division's attorney, Michele W. Milavec, dated August 12, 2020; (vi) an affidavit of Heidi Corina, a legal assistant 2 in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (vii) Postal Service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS responses to such requests dated July 20, 2020 and, (viii) a copy of the petitioners' electronically filed New York State personal income tax return (form IT-201) for the year 2016, which lists the petitioners' address as 296 Broadway, Brooklyn, New York 11211, which is the same address for petitioners as that listed on the notice addressed to Yahia-Noor A and Awadh-Fadhl, the request for conciliation conference and the petition, except that petitioners' address on the notice includes an additional four zip code digits to petitioners' five-digit zip code. The address is also the same as the listed on the copy of the notice addressed to Awadh-Fadhl and Yahai-Noor A, except that this notice includes “Apt 1.” According to the affidavit of Michele W. Milavec, the 2016 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. 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 "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 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 January 3, 2019 CMR consists of 244 pages and lists 2,865 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 January 3, 2019 to each page of the CMR, initialed and wrote the numbers “2865” and “244” on the last page next to the headings “TOTAL PIECES AND AMOUNTS” and “TOTAL PIECES RECEIVED AT POST OFFICE,” respectively.

9. Page 135 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 4676 2079 and assessment ID number L-048770070 was mailed to petitioners Awadh-Fadhl and Yahia-Noor A at 296 Broadway, Apt 1, Brooklyn, New York, 11211-6215, as listed on the notice. Page 135 of the CMR also indicates that a notice of deficiency with certified control number 7104 1002 9735 4676 2086 and assessment ID number L-048770070 was mailed to petitioners Yahia-Noor A and Awadh-Fadhl at 296 Broadway, Brooklyn, New York, 11211-6215, as listed on the notice. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bears these certified control numbers and petitioners’ names and addresses as noted.

10. The affidavit of Susan Saccocio describes the general operations and procedures of the Division’s mail room. Ms. Saccocio 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. Saccocio 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 January 3, 2019 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the CMR.

11. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject notice. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9735 4676 2086 and 7104 1002 9735 4676 2079. The USPS responses to these requests indicate that the articles bearing certified control numbers 7104 1002 9735 4676 2086 and 7104 1002 9735 4676 2079 and addressed to petitioners were delivered as addressed on January 7, 2019. Attached to the Corina affidavit as exhibit "A" are the Division's "Request For Delivery Information" for article numbers 7104 1002 9735 4676 2086 and 7104 1002 9735 4676 2079. Exhibit "B" to the Corina affidavit are the USPS responses to the Division's request indicating delivery of the same articles on January 7, 2019 to an address in Brooklyn, New York.

12. According to the affidavits submitted, a copy of the notice was properly mailed to petitioners at their Brooklyn, New York, address on the date indicated 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, 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. 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, Saccocio, Corina, or Milavec 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 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).

F. Where, as here, the timeliness of a request for 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 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 used by the Division 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).

G. 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' 2016 personal income tax return which satisfies the "last known address" requirement.² The Division's inclusion of the correct additional four zip code digits to petitioners' five-digit zip code does not harm the subject

² While it is noted that the Division added 4 additional zip code digits to petitioners' zip code as reflected on their 2016 personal income tax return filed, such a difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Combemale*, Tax Appeals Tribunal March 31, 1994). Additionally, while the Division mailed a copy of the notice to petitioners at an address that included an apartment number that did not appear on the return, such addition is inconsequential given that the Division also sent the notice to the address as indicated on the return without the apartment number. Moreover, petitioners do not contend that the notice was improperly addressed, nor do they dispute receipt of the notice, and they did not respond to the motion. As such, it is deemed admitted that the address on the notice was petitioners' last known address.

mailing (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001). It is thus 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 (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Since the BCMS conciliation conference request form was not filed until August 5, 2019, or well in excess of 90 days from the issuance of the January 3, 2019 notice, the petition is untimely, and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of notice.

H. The Division's motion for summary determination is hereby granted, the petition of Fadhl Awadh and Noor Yahia is denied and the August 30, 2019 conciliation order dismissing petitioners' request is sustained.

DATED: Albany, New York
December 3, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE