

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
AYAT F. HASSANE
for Redetermination of 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 2016.

DETERMINATION
DTA NO. 829776

Petitioner, Ayat F. Hassane, filed a petition for redetermination of 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 2016.¹

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), brought a motion dated October 13, 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. Petitioner, appearing pro se, did not respond to the Division of Taxation’s motion. The 90-day period for issuance of this determination commenced on November 16, 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.

¹ The petition lists Yehad M. Abdelaziz as petitioner’s representative. In the petition, Mr. Abdelaziz asserts authority to represent the petitioner as a “TAX PREPARER” with no other professional designation claimed to justify his authority to represent petitioner. The petition intake unit of the Division of Tax Appeals informed petitioner that Mr. Abdelaziz did not qualify to represent him before the Division of Tax Appeals and that all future communications would be directly with petitioner unless he provided a power of attorney for a qualified representative. There was no additional correspondence from petitioner to the Division of Tax Appeals regarding this issue.

Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals, following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. Petitioner, Ayat F. Hassane, filed a petition that was received by the Division of Tax Appeals on December 13, 2019. The envelope containing the petition bears a United States Postal Service (USPS) priority mail label, indicating the petition was mailed on December 11, 2019.

2. The petition states that the notice ID number being challenged is L-049212682. Attached to the petition is a copy of a notice of deficiency, number L-049212682, issued to petitioner and dated January 15, 2019 (notice). The notice was addressed to petitioner, Hassane – Ayat F, at an address in Brooklyn, New York. The petition indicates that a conciliation conference was requested with the Bureau of Conciliation and Mediation Services (BCMS), but no copy of a conciliation order was attached to the petition. The petition alleges that “We submitted all the documents with the requests of BCMS and they never responded neither to us nor the tax preparer.”

3. On March 17, 2020, the petition intake unit of the Division of Tax appeals sent a letter to petitioner requesting that he submit a copy of the conciliation order. Petitioner did not respond to the request.

4. On May 13, 2020, the Division of Taxation (Division) filed an answer in response to the petition. The answer states, in part, that petitioner did not file a request for conciliation conference with BCMS within 90 days after the issuance of the notice.

5. The Division filed a motion, dated October 13, 2020, seeking an order dismissing the petition, or in the alternative, granting summary determination in its favor. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of the notice.

6. In support of its motion and 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 August 6, 2020; (ii) a certified mail register titled: "CERTIFIED RECORD FOR – DTF – 962-F-E – Not of Def Follow Up" (CMR) postmarked January 15, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated August 6, 2020; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (v) an affidavit of the Division's attorney, Colleen M. McMahon, dated October 13, 2020; (vi) an affidavit, dated August 31, 2020, 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 form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated July 21, 2020, (viii) a copy of a conciliation order dismissing request, dated December 27, 2019, dismissing petitioner's request for a conciliation conference for notice number L-049212682, and stating "[t]he 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 15, 2019, but the request was not received until December 10, 2019, or in excess of 90 days, the request is late filed"; (ix) a copy of a request for conciliation conference (request) filed by petitioner with BCMS by way of facsimile on December 10, 2019

in protest of the notice. The request includes a fax machine date and time stamp indicating that the faxed transmission of the request was completed on December 10, 2019 at 10:57;² and (x) a copy of the petitioner's electronically filed New York State personal income tax return (form IT-201) for the year 2017, which lists the petitioner's address as the same Brooklyn, New York, address as that listed on the notice addressed to petitioner. This was the last return filed with the Division by petitioner before the notice was issued.

7. 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 "1/15/19." 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.

² The time stamp does not indicate a.m. or p.m.

8. 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."

9. The January 15, 2019 CMR consists of 12 pages and lists 163 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 15, 2019 to each page of the CMR, and initialed and wrote the number "163" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE."

10. Page 5 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 4723 1024 and assessment ID number L-049212682 was mailed to petitioner "HASSANE – AYAT F" at the address in Brooklyn, New York, as listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

11. 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 15, 2019 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the CMR.

12. 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 article of mail bearing certified control number 7104 1002 9735 4723 1024. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9735 4723 1024 and addressed to petitioner was delivered as addressed on January 17, 2019. Attached to the Corina affidavit as exhibit “A” is the Division’s “Request For Delivery Information” for article number 7104 1002 9735 4723 1024. Exhibit “B” to the Corina affidavit is the USPS response to the Division’s request

indicating delivery of the same article on January 17, 2019 to the address in Brooklyn, New York.

13. According to the affidavits submitted, a copy of the notice was properly mailed to petitioner at his 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). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“Inasmuch 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]). If material facts are in dispute,

or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion to dismiss or 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], quoting *Zuckerman*). In this case, as the issue is whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. Petitioner did not respond to the Division's motion. Accordingly, petitioner is 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]). Petitioner has presented no evidence to contest the facts alleged in the Picard, Saccocio, Corina, or McMahon affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

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 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).

D. Where, as here, the timeliness of a taxpayer's protest of a notice is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice 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).

E. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on January 15, 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 petitioner's 2017 personal income tax return which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice on January 15, 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]).

F. Having established that the notice was properly mailed to petitioner on January 15, 2019, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS within 90 days thereafter. The petition was not filed until December 11, 2019, a date that falls well beyond 90 days after the date of issuance of the notice. Since the petition was filed more than 90 days after the issuance of the notice, but prior to the date the conciliation order was issued (December 27, 2019), the Division of Tax Appeals is without jurisdiction to consider the petition. Moreover, since the petition was filed prior to the issuance of the conciliation order dismissing request, the petition was premature with regards to protesting the conciliation order, and the Division of Tax Appeals lacks jurisdiction to review that order.

G. Assuming, *arguendo*, that petitioner timely filed an amended petition subsequent to the issuance of the conciliation order dismissing request (which he did not), protesting the conciliation order, the end result for petitioner would be the same (*see Matter of Clinton Gourmet Corp.*, Tax Appeals Tribunal, September 19, 2019). That is, although such a petition

would be a timely protest of the conciliation order, petitioner's underlying protest of the notice via the request for conciliation conference would remain untimely, since petitioner has failed to meet his burden of proving that the request for conciliation conference was filed less than 90 days after the issuance of the notice (*see id.*). Hence, the Division of Tax Appeals would remain without the authority to consider the merits of the protest (*see id.*; *Matter of Papaye Restaurant, Inc.*, Tax Appeals Tribunal, May 12, 2016).

H. The Division's motion to dismiss is hereby granted, the notice dated January 15, 2019 is sustained, and the petition is denied.

DATED: Albany, New York
February 11, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE