

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>RICHARD AND SABRINA SAUTHER</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 830036
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2016.	:	

---

Petitioners, Richard and Sabrina Sauther, 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 Administrative Code of the City of New York for the year 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion, dated February 9, 2021, seeking an order dismissing the petition or, in the alternative, granting 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 by Elgin F. Polo, C.P.A., 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, James P. Connolly, 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 (request) filed by petitioners, Richard and Sabrina Sauther, with the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting a notice of deficiency dated January 13, 2020, and bearing assessment identification number L-051033331 (notice). The notice is addressed to petitioners at a Putnam Valley, New York, address.

2. Petitioners protested the notice by filing a letter, dated May 12, 2020, with BCMS referencing the notice and requesting relief. The letter is date-stamped as received by BCMS on June 3, 2020.

3. On July 3, 2020, BCMS issued a conciliation order dismissing the request. 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 13, 2020, but the request was not mailed until May 12, 2020, 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 on August 25, 2020. In their petition, petitioners do not deny receipt of the notice. The petition explains that petitioners' representative intended to file a timely protest, but was unable to do so because of the COVID pandemic.

5. To show proof of mailing of the notice, the Division submitted the following with its motion papers: (i) an affirmation of Maria Matos, Esq., dated February 9, 2021; (ii) an affidavit, dated January 22, 2021, 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 "Certified Record for DTF-962-F-E - Not of Def Follow Up" (CMR), postmarked January 13, 2020; (iv) an affidavit, dated January 28, 2021, of Susan Saccocio, the manager of the Division's mail room; (v) a copy of the notice with the associated mailing cover sheet; (vi) a copy of petitioners' request; and (vii) a copy of petitioners' 2018 New York State resident income tax return (form IT-201), dated April 2, 2019, which lists the same Putnam Valley, New York, address for petitioners as that listed on the notice.

6. Ms. Matos's affirmation asserts that petitioners' 2018 form IT-201 was filed on April 13, 2019, and is the last return filed by petitioners before the notice was issued. The affirmation also asserts that petitioners' request was faxed to BCMS on June 3, 2020, and is enclosed as attachment 4 to the affirmation. Attachment 4 includes various documents, including the conciliation order issued by BCMS, dated July 3, 2020. The only document appearing to constitute a request in attachment 4 is a letter, dated May 12, 2020, on the letterhead of Kabat, Schertzer, De La Torre, Taraboulos & Co. (KSDT). That letter has been determined to be the request (*see* finding of fact 2) because, while the letter does not specifically reference the notice, it refers to the fact that petitioners were recently assessed, in error, additional tax due in the amount asserted by that notice for the same time period. The assertion that the request was faxed to BCMS on June 3, 2020, appears to be incorrect, as the letter embodying petitioners' request bears no fax header. Moreover, attachment 4 includes an envelope addressed to BCMS, whose return address is that of KSDT. The envelope bears a postmark, of which the only

decipherable part is the month, "May." Attachment 4 also includes an undated fax cover page with "BCMS Request," in the "Notes" field, but that page clearly indicates that it was being sent from BCMS to another number, and not to BCMS. Accordingly, it is determined that petitioners mailed their request for conciliation to BCMS on or after May 12, 2020, the date of petitioners' request.

7. 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. The CMR is a computer printout. 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 "1-13." 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.

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. 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.”

9. The CMR in the present matter consists of 9 pages and lists 116 certified control numbers, along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 13 to 15 entries, except for the final page which includes 6 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.

10. A USPS representative affixed a postmark dated January 13, 2020 to each page of the CMR, wrote the number “116” on page 9, below the blank opposite the heading “Total Pieces Received at Post Office,” and initialed or signed page 9.

11. Page 4 of the CMR indicates that a notice was sent to petitioners at the same Putnam Valley, New York, address as on the notice (*see* finding of fact 1) with the certified control number 7104 1002 9735 5356 8848 and reference number L-051033331. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this same certified control number and petitioners’ names and address as noted.

12. The affidavit of Susan Saccocio describes the Division’s mail room’s general operations and procedures. Ms. Saccocio has been manager of the Division’s mail room since 2017 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. 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. A clerk checks the first and last pieces of mail against the information on the CMR. The clerk 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. According to Ms. Saccocio, the affixation of the USPS postmark on each page of the CMR and the USPS employee's writing "116" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 116 articles of mail listed on the CMR, including the article addressed to petitioners, were received by the USPS for mailing on January 13, 2020.

13. According to both the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioners on January 13, 2020, as claimed.

14. 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* findings of fact 3 and 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 petitioners' 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 (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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer’s last known address (*see* Tax Law § 681[a]), and it is the Division’s initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

E. Where, as here, the timeliness of a request for conciliation conference or 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 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 Novar TV & Air Conditioner Sales & Serv.*).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioners' last known address on January 13, 2020. 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' 2018 form IT-201, which satisfies the "last known address" requirement. It is therefore concluded that the Division properly mailed the notice on January 13, 2020, 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]; 689 [b]*).

G. The record establishes that petitioners filed their request by mailing it to BCMS no earlier than May 12, 2020, as the date of the letter constituting the request in this matter is May 12, 2020. Having been filed no earlier than May 12, 2020, the request was thus untimely and properly dismissed by BCMS.

H. While petitioners have not responded to the Division’s motion, the petition asserts that petitioners’ effort to timely respond to the notice was hindered by the COVID pandemic and asks for that to be taken into account in determining the timeliness of the petition’s filing. As a forum of limited jurisdiction, the Division of Tax Appeals has no flexibility with regard to the Tax Law’s 90-day limitations period for protesting a conciliation order (*see Matter of American Woodcraft*). Moreover, Governor Cuomo’s Executive Order 202.8, dated March 20, 2020, which provides relief from statutes of limitation in certain circumstances, does not apply here. That order provided, in part, as follows:

*“In accordance with the directive of the Chief Judge of the State to limit operations to essential matters during the pendency of the COVID-19 health crises, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate’s court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020 [emphasis added].”*

The italicized language of the Executive Order indicates that such provisions do not apply to the administrative procedures of the Division of Tax Appeals, as such procedures are not governed by the Chief Judge of the State (*see* Judiciary Law § 211; Tax Law §§ 2004, 2006).

I. The Division’s motion for summary determination is granted, the petition of Richard and Sabrina Sauther is denied, and the July 3, 2020, conciliation order issued by BCMS is sustained.

DATED: Albany, New York  
April 29, 2021

/s/ James P. Connolly  
ADMINISTRATIVE LAW JUDGE