

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NICHOLAS AND CAITLIN SHELSE	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 830305
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.	:	

Petitioners, Nicholas and Caitlin Shelse, 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 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel), brought a motion dated May 20, 2021, 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 June 21, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, 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 March 11, 2020, and bearing assessment identification number L-051313056 (notice). The notice was addressed to petitioners, Nicholas and Caitlin Shelse, at an address in Staten Island, 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 by way of facsimile on November 3, 2020. The request includes a fax machine date and time stamp indicating that the faxed transmission of the request was completed on November 3, 2020 at 16:39 (i.e., 4:39 p.m.).

3. On December 11, 2020, 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 July 27, 2020, but the request was not faxed until November 3, 2020, or in excess of 90 days, the request is late filed.”¹

4. Petitioners filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on February 9, 2021.

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 April 28,

¹ The July 27, 2020 date appears to be a typographical error because, as noted herein, the certified mail register clearly shows that the notice was mailed on March 11, 2020.

2021; (ii) a copy of pages 1, 100 and 453 of a certified mail register titled: “CERTIFIED RECORD FOR – DTF – 962-E – Not of Deficiency 962-F-E – Not of Def Follow Up DTF-963-F-E – Not of Det Follow Up” (CMR) postmarked March 11, 2020; (iii) an affidavit of Susan Saccocio, a manager in the Division’s mail room, dated May 5, 2021; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioners; (v) an affirmation of the Division’s attorney, Michael Trajbar, dated May 20, 2021; (vi) an affidavit, dated May 11, 2021, of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel; (vii) a Request for Delivery Information/Return Receipt After Mailing (United States Postal Service [USPS] form 3811-A) and the USPS response to such request dated April 26, 2021; and (viii) a copy of petitioners’ address summary from the Division’s e-MPIRE database showing petitioners’ address as updated via the USPS National Change of Address (NCOA) database, effective May 25, 2019, which lists the same address for petitioners as that listed on the notice. This address also matches the address listed on the petition and request, except they lack the additional four zip code digits added to petitioners’ five-digit zip code listed on the notice and NCOA database. This was petitioners’ last known address prior to the issuance of the notice.

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, which in this case was "3/11/20." 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 CMR for the batch of notices to be issued on March 11, 2020, including the notice addressed to petitioners herein, allegedly consisted of 453 cut sheet pages. The Division included with its submission only page "1" (the first page), page "100" (the page on which information pertaining to petitioners appears) and page "453" (the last page of the CMR). Each of these three pages includes in its upper left corner the preprinted year/day/time "run" listing of "20200650635." Appearing in the upper right corner of the pages 1 and 453 is the handwritten date "3/11/20," reflecting the manual change made by the Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory

notices and the CMR were delivered into the possession of the USPS. Each of the foregoing three pages includes a USPS postmark, dated March 11, 2020, of the USPS Albany, New York, General Mail Facility. Ms. Picard noted that the portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

9. Page 100 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 5422 7171, and reference number L-051313056, was mailed to petitioners at the Staten Island, New York, address listed on the subject notice of deficiency. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this same certified control number and petitioners’ name and address as noted.

10. Appearing below the 2 entries on page 453 of the CMR is the preprinted heading “TOTAL PIECES AND AMOUNTS,” next to which the preprinted number “6,171” and the handwritten numbers “6171 pcs 453 pgs” appear, as well as the initials of a USPS employee.

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. According to Ms. Saccocio's affidavit, a 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 March 11, 2020 CMR indicates that a USPS employee complied with this request by writing the number of pieces received on the CMR.

12. According to the affidavits submitted, a copy of the notice was properly mailed to petitioners at their Staten Island, New York, address on the date indicated as claimed.

13. The affidavit of Heidi Corina details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed form 3811-A seeking information for the item mailed by the Division bearing certified control number 7104 1002 9730 5422 7171 on March 11, 2020 to petitioners at their Staten Island, New York, address. The USPS response to the request confirmed that the article, bearing the aforementioned certified control number and addressed to petitioners, was delivered on March 19, 2020, at 1:43 p.m., to an address in "Staten Island, NY 10312-2225." The scanned image of the recipient's signature as shown on the USPS response appears to be the signature of Nicholas Shelse and includes Mr. Shelse's handwritten name below his signature.

14. Attached to the Corina affidavit as exhibit “A” is the Division’s “Request for Delivery Information” for article number 7104 1002 9730 5422 7171. Exhibit “B” to the Corina affidavit is the USPS response to the Division’s request indicating delivery of the same article.

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 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. 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 affidavits or Trajbar affirmation; 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 (*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 petitioners' 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. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the submission of a partial (or truncated) CMR, as here, is not sufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams*, Tax Appeals Tribunal, April 14, 2016; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Hence, that proof alone fails to establish that the notice of deficiency was properly mailed on March 11, 2020 and, thus, the period within which to file a protest was not triggered as of such date.

H. An inadequacy in the evidence of mailing may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In

such instances of failure to prove proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as the taxpayer actually receives the notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v Tax Commn. of the State of N.Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the evidentiary deficiencies with regard to demonstrating the mailing of notice of deficiency L-051313056, the Division has nonetheless established, via the Corina affidavit and the accompanying USPS form 3811-A and response thereto, that the notice of deficiency was mailed by certified mail and was, in fact, delivered to and accepted by petitioners on March 19, 2020 (*see* finding of fact 13). As a result, the period within which to challenge the subject notice of deficiency commenced to run on the date of such actual receipt, i.e., March 19, 2020, and in order to be timely, a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS, had to have been filed within 90 days thereafter (*see Matter of Agosto; Matter of Rosen*). Since the BCMS conciliation conference request form was not filed until November 3, 2020, or well in excess of 90 days from the delivery of the March 11, 2020 notice, the petitioners' request for a conciliation conference was properly dismissed by the December 11, 2020 order issued by BCMS, and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of the notice.

J. The Division's motion for summary determination is hereby granted, the petition of

Nicholas and Caitlin Shelse is denied, and the December 11, 2020 conciliation order dismissing petitioners' request is sustained.

DATED: Albany, New York
September 9, 2021

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE