

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOHAMMAD R. CHOWDHURY	:	ORDER
AND LUTFUN NAHAR	:	DTA NO. 827610
	:	
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the	:	
Tax Law and the Administrative Code of the City of	:	
New York for the Year 2014.	:	

Petitioners, Mohammad R. Chowdhury and Lutfun Nahar, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2014.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), brought a motion dated August 26, 2016, 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)(1)(i), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, did not file a response to the Division's motion. 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, Administrative Law Judge, renders the following order.

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 for the year 2014.

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 December 7, 2015, bearing assessment identification number L-043818249-8. The notice is addressed to petitioners, Mohammad R. Chowdhury and Lutfun Nahar, at 701 Avenue C, Apartment 12B, Brooklyn, New York 11218-4103.

2. Petitioners filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the December 7, 2015 notice. The request was mailed to BCMS on March 21, 2016 and received by BCMS on March 23, 2016.

3. On April 8, 2016, BCMS issued a Conciliation Order Dismissing Request to petitioners. The order determined that petitioners' protest of the subject 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 December 7, 2015, but the request was not mailed until March 21, 2016, 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 May 2, 2016.

5. To show proof of proper mailing of the December 7, 2015 notice, the Division provided the following with its motion papers: i) an affidavit, dated July 28, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments

Receivable” (CMR) postmarked December 7, 2015; (iii) an affidavit, dated July 1, 2016, of Bruce Peltier, a stores and operations supervisor in the Division’s mail room; (iv) a copy of the December 7, 2015 notice with the associated mailing cover sheet; and (v) petitioners’ electronically filed form IT-201, resident income tax return for the year 2014, filed March 17, 2015, which lists petitioners’ address as 701 Avenue C, Apartment 12-B, Brooklyn, New York 11218. The form IT-201 was the last return filed with the Division by petitioners before the notice was issued.

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and 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. 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of “12/7/15.” In addition, as described by Ms. Nagengast, 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.

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

taxpayer mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control numbers are 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 in the present matter consists of 37 pages and lists 400 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 37, which contains 4 entries. Ms. Nagengast 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. A USPS representative affixed a postmark dated December 7, 2015 to each page of the CMR, wrote and circled the number "400" on page 37 next to the heading "Total Pieces Received At Post Office" and initialed or signed page 37. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 400.

9. Page 14 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0681 3495 and reference number L-043818249, was mailed to petitioners at the Brooklyn, New York, address listed on the subject Notice of Deficiency. The corresponding mailing cover sheet attached to the Nagengast affidavit as exhibit "B" bears this certified control number and petitioners' names and address as noted.

10. The affidavit, dated July 1, 2016, of Bruce Peltier, a supervisor in the mail room since 1999 and currently a stores and operations supervisor, describes the mail room's general operations and procedures. Additionally, Mr. Peltier's affidavit expressly states that based on his

review of Ms. Nagengast's affidavit, and the CMR attached to it, the subject Notice of Deficiency was delivered to and accepted by the USPS on December 7, 2015.

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 (*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 order 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 of fact or where the material issue of fact is "arguable" (*Glick & Dolleck 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 the 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).

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 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).

F. Here, the Division has failed to offer proof sufficient to establish the mailing of the statutory notice to petitioners' last known address on December 7, 2015. Although the CMR appears to have 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 fail to establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Specifically, the affidavit of Mr. Peltier unequivocally references and relies upon the affidavit of Ms. Nagengast and the CMR attached thereto in order to confirm mailing of the subject notice to petitioners' address. However, the affidavit of Mr. Peltier is dated July 1, 2016, a date which precedes the date of Ms. Nagengast's affidavit of July 28, 2016, thus making Mr. Peltier's assertion of review and reliance highly questionable and casting doubt on the reliability of that evidence. Given the discrepancy in dates, the Peltier affidavit can be accorded no weight. Due the discrepancy in dates of Mr. Peltier's and Ms. Nagengast's affidavits, the Division has not met its burden of proving proper mailing and summary determination cannot be granted in favor of the Division at this juncture.

G. The Division's motion for summary determination is denied without prejudice.

DATED: Albany, New York
December 15, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE