

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MAEIR LATI AND NELLY SAADIA</b>	:	
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 2015.	:	ORDER DTA NO. 829578

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Petitioners, Maeir Lati and Nelly Saadia, filed a petition for revision 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 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel) brought a motion dated December 9, 2019, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to Tax Law § 2006 (6) and 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 file a response to the Division of Taxation’s motion. Accordingly, the 90-day period for issuance of this order commenced on January 8, 2020, the due date for petitioners’ response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 tax year 2015.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioners, Maeir Lati and Nelly Saadia, a notice of deficiency dated January 3, 2019, assessment identification number L-048767153 (notice), asserting additional New York State and New York City personal income taxes in the amount of \$2,491.00, plus interest, for the year 2015. The notice is addressed to “LATI-MAEIR SAADIA-NELLY 264 AVENUE S APT 2 BROOKLYN NY 11223-2708.” The mailing cover sheet of this notice contains certified control number 7104 1002 9735 4676 2994.

2. Petitioners’ then-representative, Yehad Abdelaziz , The Five Pillars, filed a request for conciliation conference (request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS). Mr. Abdelaziz hand-dated and signed the request on March 14, 2019. On this request, petitioners’ address is listed as 264 Avenue S Apt. 2, Brooklyn, NY. The request was filed on August 5, 2019, when it was faxed to BCMS.

3. On August 23, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation 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 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. On September 24, 2019, a petition protesting the conciliation order was filed by petitioners.<sup>1</sup> The United States Postal Service (USPS) Priority Mail Flat Rate Envelope in which the petition was mailed bears a USPS Priority Mail 2-day postage label dated September 24, 2019. The petition lists petitioners' address as 264 Avenue S, Brooklyn, NY 11223. There is no dispute that the petition was filed within 90 days after the August 23, 2019 issuance of the conciliation order and constitutes a timely challenge thereto.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated December 9, 2019, of Charles Fishbaum, Esq., the Division's representative; (ii) an affidavit, dated November 20, 2019, 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 "Certified Record For - DTF-962-F-E – Not of Def Follow Up DTF-963-E - Notice of Determination DTF-963-F-E – Not of Def Follow UP" (CMR) postmarked January 3, 2019; (iv) an affidavit, dated November 22, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (v) a copy of the January 3, 2019 notice with the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference, faxed to BCMS on August 5, 2019; and (vii) a copy of petitioners' joint New York State resident income tax return (form IT-201) for the year 2017, which was electronically filed on or about February 21, 2018.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously 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 the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is

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<sup>1</sup> Although Mr. Abdelaziz was listed as petitioners' representative on the petition, he does not qualify to represent petitioners before the Division of Tax Appeals under 20 NYCRR 3000.2 (*see* Tax Law § 2014 [1]).

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 "1/3/19" and "1/3," respectively. 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.

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 PO Address."

8. The January 3, 2019 CMR consists of 244 pages and list 2,865 certified control numbers along with corresponding assessment numbers, names and addresses. A varying number of entries appear on each page of the CMR. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark dated January 3, 2019 to each page of the CMR. On the last page of the CMR, the USPS employee handwrote “2865 pcs” on the line next to the preprinted number “2,865” and the heading “Total Pieces and Amounts.” In addition, the USPS employee handwrote “244 pgs” and placed circled initials next to the heading “Total Pieces Received at Post Office” on the last page of the CMR.

9. Page 143 of the CMR indicates that a notice with certified control number 7104 1002 9735 4676 2994, and reference number L-048767153 was mailed to “Lati-Maeir Saadi-Nelly” at 264 Avenue S Apt 2, Brooklyn, NY 11223-2708. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioners’ name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room and whose current title is Stores and Operations Supervisor, describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the

information contained on the CMR, and then performs a random review of up to 30 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 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. As noted, each of the 244 pages of the CMR attached to the Picard affidavit as Exhibit "A" contains a USPS postmark dated January 3, 2019. In addition, the USPS employee's initials appear on page 244 of the CMR. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 2,865 articles of mail listed on the CMR, including the article addressed to petitioners, were received by the USPS for mailing on January 3, 2019.

11. According to the Picard and Ramundo affidavits, the notice was mailed to petitioners on January 3, 2019, as claimed.

12. Petitioners' electronically filed 2017 resident income tax return (*see* finding of fact 5) reported petitioners' address as 264 Avenue S, Brooklyn, NY 11223. This tax return was the last return filed by petitioners prior to the issuance of the subject notice.

13. Charles Fishbaum, in his affirmation submitted in support of the motion, asserted, among other things, that "[w]hen the Notice under protest were [sic] issued, the petitioner's [sic] last known address was 264 Avenue S, Brooklyn, NY 11223."

#### ***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). As the petition in this matter was timely filed (*see* finding of fact 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. Given the timely petition, the Division's motion to dismiss under section 3000.9 (a) of the Rules is improperly brought.

B. A motion for summary determination shall be granted:

“if, upon all 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]).”

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]). 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]; *Museums at Stony Brook v Village 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]). 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, 317 [2d Dept 1989]).

D. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. Where a notice is found to have been properly mailed "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (see *Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). When a notice is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*, see also *Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

E. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance (*Matter of United Water New York*, Tax Appeals Tribunal, April 4, 2004; see *Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).



F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Mr. Ramundo, 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).

G. The CMR for January 3, 2019 provides sufficient documentary proof to establish that a notice of deficiency, dated January 3, 2019, was mailed as addressed to petitioners. The 244-page document listed 2,865 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated January 3, 2019. Additionally, on the last page of the CMR, the postal employee wrote “2865 pcs” next to the heading “Total Pieces and Amounts,” and also wrote “244 pgs” and placed circled initials next to the heading “Total Pieces Received at Post Office” to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 201).

H. The only remaining issue on this motion is the question of whether the notice of deficiency was addressed to petitioners at their “last known address” at the time it was mailed, so as to be considered “properly mailed.” Tax Law § 681 (a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. This section further requires that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.” A taxpayer’s last known address is “the address given on the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address” (Tax Law § 691 [b]).

I. Petitioners' electronically filed their resident income tax return for the year 2017 on or about February 21, 2018. This was the last return filed by petitioners prior to the issuance of the subject notice and it lists petitioners' address as 264 Avenue S, Brooklyn, NY 11223. The subject notice lists petitioners' address as 264 Avenue S, Apt. 2, Brooklyn, NY 11223-2708. The Division has not presented any evidence as to the source of the apartment number included as part of petitioners' address listed on the subject notice. Under the foregoing circumstances, there are material facts in issue and the Division cannot be said to have proved mailing of the January 3, 2019 notice of deficiency to petitioners' last known address (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).<sup>2</sup> In turn, without proper mailing, the 90-day period for filing either a request or a petition is tolled until such time as petitioners actually received the subject notice (*Matter of Riehm v Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Since there is no evidence as to when the notice may have been received by petitioner, the Division's motion for summary determination must be denied.

J. The Division of Taxation's motion for summary determination is denied, and a hearing will be scheduled in due course.

DATED: Albany, New York  
July 02, 2020

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup> It is noted that the USPS Domestic Mail Manual 600 (Basic Standards for All Mailing Services), 602 (1.3 [c]) (Address Elements) and (1.4.2 [e]) (Complete Address Elements) regards the inclusion of a secondary address unit designator (such as a street, apartment, unit or suite number, as applicable) as a Required element of an address. From this it follows that the use of an incorrect secondary address unit designator (e.g., an incorrect apartment number) is properly considered a consequential error for purposes of commencing the period within which a taxpayer must act to reserve the right to be heard on the merits (*see Matter of Combemale*).