

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ADNAN SHALEIN AND HAIJAR O. NAHNOUSH

ORDER
DTA NO. 829778

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 Tax Year 2017. :

Petitioners, Adnan Shalein and Haijar O. Nahnoush, 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 tax year 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion, dated October 19, 2020, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing pro se, did not respond to the motion by November 18, 2020, which date began the 90-day period for issuance of this order.¹ 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 order.

¹ The petition listed Yehad Abdelaziz as petitioners' representative. In the petition, Mr. Abdelaziz asserts authority to represent petitioners solely as their "TAX PREPARER" with no other qualifying designation identified. Hence, Mr. Abdelaziz is not qualified to represent petitioners in this matter (*see* Tax Law § 2014).

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals 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 petition filed by petitioners, Adnan Shalein and Haijar O. Nahnoush, with the Division of Tax Appeals in protest of a notice of deficiency bearing assessment identification number L-048780557, dated November 7, 2018 (notice). The notice is addressed to petitioners at an address in Brooklyn, New York.

2. Petitioners filed their petition with the Division of Tax Appeals when they mailed the petition, by United States Postal Service (USPS) priority mail, which was marked as received on December 13, 2019. The envelope containing the petition bears a USPS priority mail sticker that shows a postmark of December 11, 2019. In section IX of their petition, petitioners checked the box indicating that they filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) and inserted “November 27, 2019” as the date on which BCMS issued a conciliation order or the conciliation conference was discontinued. No copy of any conciliation order was attached to the petition.

3. The Division’s answer to the petition asserts that “Petitioners did not request a Conciliation Conference before [BCMS] for the tax year 2017.”

4. In support of the motion and to show proof of proper mailing of the notice, the Division provided the following with its motion papers:

(i) an affirmation, dated October 16, 2020, of Maria Matos, Esq., the Division's representative; (ii) an affidavit, dated September 30, 2020, 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, in part, "Certified Record For – DTF-962-F-E – Not of Def Follow Up" (CMR) postmarked November 7, 2018; (iv) an affidavit, dated October 15, 2020, of Susan Saccocio, a manager in the Division's mail room; (v) a copy of the notice, with the associated mailing cover sheet; (vi) a copy of petitioners' joint New York State resident income tax return (form IT-201) for the year 2017, electronically filed on or about March 25, 2018, which showed a Brooklyn, New York, address for petitioners.

5. Ms. Matos' affirmation asserts that petitioners' 2017 joint resident income tax return was the last return filed by petitioners before the issuance of the notice. Her affirmation does not address whether petitioners filed a request for conciliation with BCMS as claimed in the petition and denied in the Division's answer.

6. The affidavits of Ms. Picard and Ms. Saccocio claim that the Division mailed the notice to petitioners on November 7, 2018, and offer proof of the Division's standard procedures for mailing statutory notices and proof that those procedures were followed in mailing the notice in this matter. Neither affidavit offers any proof as to whether petitioners filed a request for conciliation with BCMS, as claimed by petitioners.

7. 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) of the Rules. Because the issue raised by this motion concerns the timeliness of petitioner's filing of the petition in this matter,

the Division of Tax Appeals' jurisdiction to hear this matter is implicated, and therefore this matter will be addressed as a motion to dismiss.

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination. This standard also applies here where the Division has made a motion to dismiss the petition. 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 (*see 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 (*see* Tax Law §§ 681 [b]; 689 [b]). Alternatively, a taxpayer may contest a notice of deficiency 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]). Here, the Division asserts that petitioners did not file the petition in this matter until more than 90 days from the date of mailing of the notice, and argues that, therefore, the petition was untimely and must be dismissed. This argument assumes that petitioners’ 90-day period for filing a protest in this matter runs from the date of the issuance of the notice. This assumption is faulty. It overlooks that, in their petition, petitioners asserted that they filed a request for conciliation conference with BCMS and that BCMS issued a conciliation order or the BCMS proceeding was otherwise discontinued on November 27, 2019. Thus, to establish that the petition was not timely filed in this matter, the Division must show either that, contrary to the assertions in the petition, petitioners did not file any request for conciliation conference in this matter and that their petition was filed more than 90 days after issuance of the notice, or that they did file a request for conciliation conference, but the request was filed more than 90 days after the mailing of the notice to petitioners. The Division made neither of those showings on this motion. Its proof on this motion is, therefore, not sufficient to eliminate all material and triable issues of fact regarding the timeliness of the petition in this matter and the motion must, for that reason, be denied (*see* 20 NYCRR 3000.9 [b] [1]; *Winegrad*, 64 NY2d at 853).

E. The Division's motion is denied without prejudice and this matter will be scheduled for hearing in due course.

DATED: Albany, New York
February 11, 2021

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE