

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MOLA SACKO	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 828010
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2015.	:	

Petitioner, Mola Sacko, filed an exception to the determination of the Administrative Law Judge issued on September 14, 2017. Petitioner appeared by Mufu Sadiku, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on January 10, 2018, the date that petitioner's letter reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of deficiency number L-044724639.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 1 to reflect the procedural history of this matter. As so modified, the Administrative Law Judge's findings of fact appear below.

1. The Division of Taxation (Division) brought a motion, dated May 23, 2017, for an order dismissing the petition or granting summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.5 and 3000.9 [a], [b]). The subject of the motion is the timeliness of petitioner's protest of a notice of deficiency, dated July 13, 2016, and bearing assessment identification number L-044724639. The notice is addressed to petitioner, Mola Sacko, at an address in Brooklyn, New York.

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the July 13, 2016 notice of deficiency. The request was filed with BCMS on October 19, 2016.

3. On November 4, 2016, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notice of deficiency 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 13, 2016, but the request was not mailed until October 19, 2016, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on December 23, 2016.

5. To show proof of proper mailing of the July 13, 2016 notice of deficiency,

the Division provided the following with its motion papers: (i) an affidavit, dated May 18, 2017, 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 July 13, 2016; (iii) an affidavit, dated May 22, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room; (iv) a copy of the July 13, 2016 notice of deficiency with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference, postmarked on October 19, 2016 and (vi) petitioner's electronically filed 2015 New York resident income tax return, dated February 3, 2016, which lists the same address for petitioner as that listed on the subject notice. The 2015 income tax return was the last return filed with the Division by petitioner 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 page of the CMR in the present case to the actual mailing date of "7/13/16." 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 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 CMR in the present matter consists of 25 pages and lists 272 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 25, which contains 8 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 July 13, 2016 to each page of the CMR, wrote and circled the number "272" on page 25 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 25.

9. Page 10 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9730 0001 6595 and reference number L-044724639 was mailed to petitioner 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 petitioner's name and address as noted.

10. The affidavit of Melissa Kate Koslow describes the Division's mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. 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. The first and last pieces of mail are checked against the information on the CMR. A clerk then 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. Each page of the CMR in exhibit "A" of the Nagengast affidavit contains a USPS postmark of July 13, 2016. On page 25, corresponding to "Total Pieces and Amounts," is the preprinted number 272 and next to "Total Pieces Received At Post Office" is the handwritten and circled entry "272." There is a set of initials or a signature on page 25.

11. According to both the Nagengast and Koslow affidavits, a copy of the subject notice was mailed to petitioner on July 13, 2016, as claimed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge treated the Division's motion as a summary determination motion and then reviewed the standards for the granting of such a motion.

Next, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge observed the Division must establish that it properly issued the notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to do so, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing evidentiary standards and established that the notice of deficiency was properly mailed to petitioner on July 13, 2016. The Administrative Law Judge found that the Division proved its standard mailing procedure through affidavits submitted by Ms. Nagengast and Ms. Koslow. The Administrative Law Judge also concluded that such affidavits, along with the properly completed CMR, showed that such procedure was followed in this instance. The Administrative Law Judge also found that the notice was properly mailed to petitioner's last known address; that is, the address listed on petitioner's 2015 New York income tax return. Accordingly, based on the issuance date of the notice and the filing date of the request for conciliation conference, the Administrative Law Judge found that petitioner's conference request was untimely and granted the Division's motion.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner asserts that the request for conciliation conference was late because he was gathering supporting documents to use in his case. Petitioner attached one such document to the exception. Petitioner requests that the brief tardiness of his filing be excused. Petitioner also makes arguments pertaining to the merits of his case.

The Division contends that the Administrative Law Judge correctly determined that it proved proper mailing of the subject notice of deficiency on July 13, 2016 and, accordingly, correctly determined that petitioner's request for conciliation conference was late-filed.

OPINION

The Administrative Law Judge properly treated the Division's motion as one for summary determination because the Division of Tax Appeals has jurisdiction over the petition, as it was timely filed following the issuance of the conciliation order dismissing request.

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]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212 (20 NYCRR 3000.9 [c]). "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 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 [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*).

Petitioner did not respond to the Division’s motion. Accordingly, he is 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 Assoc. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Nagengast and Koslow affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

Tax Law § 681 (a) authorizes the Division to mail notices of deficiency to a taxpayer at his or her last known address using certified or registered mail. With certain exceptions not relevant here, there is a 90-day statutory time limit for filing a request for conciliation conference or a petition following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 689 [b]; 20 NYCRR 4000.5 [c] [4]).

Where, as here, the timeliness of a taxpayer’s protest against a notice of deficiency or conciliation order is in question, we must first determine whether the Division has met its burden of demonstrating the fact and date of mailing of such notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet its burden “by establishing the use of a standard mailing procedure for conciliation orders [or notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order [or notice] in this case” (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

We agree with the Administrative Law Judge’s conclusion that the Division’s proof establishes that the subject notice of deficiency was mailed to petitioner’s last known address on

July 13, 2016. Specifically, the Nagengast and Koslow affidavits establish the Division's standard mailing procedure and such affidavits, along with the properly completed CMR, establish that such procedure was followed with respect to the mailing of the subject notice (*see Matter of Chin* Tax Appeals Tribunal, December 3, 2015; *Matter of Western Aries Constr., LLC*, Tax Appeals Tribunal, March 3, 2011). Additionally, the address on the mailing cover sheet and CMR entry is the same as the address listed on petitioner's 2015 New York resident income tax return. This satisfies the last known address requirement (*see* Tax Law § 691 [b]). The Division thus properly mailed the notice at issue to petitioner on July 13, 2016 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 (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioner's request for conciliation conference, filed on October 19, 2016, was therefore untimely and properly dismissed by BCMS.

We reject petitioner's request that his failure, by eight days, to timely file his protest should be excused. The statutory time limit for the filing of petitions and conciliation conference requests is strictly enforced (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]).

Given petitioner's untimely protest, we are precluded from addressing his arguments regarding the merits of his case (*see e.g. Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

Finally, consistent with "our longstanding policy against considering evidence that was not made part of the record below," we do not accept into the record the document submitted with petitioner's exception and have not considered that document in the rendering of this decision

(*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014 citing *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mola Sacko is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Mola Sacko is denied; and
4. The conciliation order dismissing request is sustained.

DATED: Albany, New York
June 7, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner