

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEMAL OULD DAHI & AMINETOU MAHAM : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 827568
York State Personal Income Tax under Article 22 of :
the Tax Law for the Year 2012. :

Petitioners, Jemal Ould Dahi and Aminetou Maham, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), brought a motion dated January 3, 2017 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(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. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

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.

FINDINGS OF FACT

1. Petitioners, Jemal Ould Dahi and Aminetou Maham, filed a request for conciliation conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) of the

Division of Taxation (Division). The Request was filed in protest of a Notice of Deficiency, dated April 28, 2014 and bearing assessment number L-040822183, for tax in the amount of \$6,872.52, plus interest, for the year 2012. The Request was date stamped as received by BCMS on December 28, 2015 and mailed on December 23, 2015.

2. On January 15, 2016, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioners. Referencing notice number L-040822183, the Order determined that petitioners' protest 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 April 28, 2014, but the request was not mailed until December 23, 2015, or in excess of 90 days, the request is late filed.”

3. Petitioners challenged this Order by filing a petition with the Division of Tax Appeals. The petition was dated and signed by petitioners on April 7, 2016, and the envelope in which the petition was mailed bears a United States Postal Service (USPS) postmark dated April 8, 2016. The envelope and petition are, in turn, date stamped as received by the Division of Tax Appeals on April 11, 2016. There is no dispute that the petition was filed within 90 days after the January 15, 2016 issuance of the Order and constitutes a timely challenge thereto.

4. In support of its motion and to prove mailing of the Notice of Deficiency under protest, the Division submitted the following with its motion papers: (i) an affidavit, dated December 29, 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 April 28, 2014; (iii) an affidavit, dated January 3, 2017, of Melissa Kate Koslow, a supervisor in the mail room of the Division; (iv) a copy of the Notice of Deficiency, dated April 28, 2014, with the associated mailing cover sheet;

(v) a copy of petitioners' request for a conciliation conference at BCMS along with the Order; and (vi) a copy of petitioners' Form IT-201 Resident Income Tax Return filed for the 2013 tax year that reflects petitioners' address as the Brooklyn, New York, address listed on the petition.

5. 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 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 "4/28/14." 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 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.

6. 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 "Names of Addressee, Street, and PO Address."

7. The CMR in the present matter consists of 29 pages and lists 310 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 29, which contains two 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 April 28, 2014 to each page of the CMR, circled the preprinted number "310" on page 29 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 29. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 310.

8. Page 11 of the CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 0232 8252 and reference number L-040822183 was mailed to petitioner Jemal Ould Dahi 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.

9. The affidavit of Melissa Kate Koslow, a supervisor in the mail room since 2010 and currently Head Mail & Supply Clerk, describes the 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 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 listed on the CMR 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. Here, as noted, the USPS employee initialed page 29 and affixed a postmark dated April 28, 2014 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. Here, the USPS employee complied with this request by circling the number “310” on the last page next to the heading “Total Pieces Received at Post Office.”

10. According to the Koslow affidavit, a copy of the subject notice was mailed to petitioners on April 28, 2014, as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brought a motion for summary determination under § 3000.9(b) of the Tax Appeals Tribunal’s Rules of Practice and Procedure (Rules). A motion for summary determination may 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 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][i]).

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 Assoc. v. Standard Metals Corp.*, 99 AD2d 227 [1st

Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioners have, thus, presented no evidence to contest the facts alleged in the Nagengast and Koslow affidavits; consequently, those facts are deemed admitted (*see Kuehne & Nagel v. Baiden; Whelan v. GTE Sylvania*, 182 AD2d 446 [1st Dept 1992]).

B. 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 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]). 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 merits of the protest (*see* Tax Law § 681[b]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified mail of the subject statutory notice to petitioners’ last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar*

TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

D. The Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., April 28, 2014, to petitioners’ last known address. The CMR has 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 adequately describe the Division’s general mailing procedure, as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioners’ New York State income tax return for the year 2013, which satisfies the “last known address” requirement in Tax Law § 681(a). It is concluded that the notice was properly mailed to petitioners on April 28, 2014, 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]).

E. Petitioners’ Request was filed on December 23, 2015. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the January 15, 2016 Order issued by BCMS. Petitioners have offered no claim or evidence to meet their

burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

F. The Division of Taxation's motion for summary determination is granted, the petition of Jemal Ould Dahi and Aminetou Maham is denied, and the Conciliation Order Dismissing Request, dated January 15, 2016, is sustained.

DATED: Albany, New York
April 13, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE