

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MUTHANA IKHMAYES AND HUDA AKDEIR : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 829562
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 Years 2015, :
2016, and 2017. :

Petitioners, Muthana Ikhmayes and Huda Akdeir, 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 years 2015, 2016, and 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), brought a motion, dated May 6, 2020, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) (i) 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 motion.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 determination.

¹ The petition listed Yehad Abdelaziz as petitioners' representative. By letter dated October 17, 2019, petitioners were notified that Mr. Abdelaziz did not appear qualified to represent petitioners at the Division of Tax Appeals (*see* 20 NYCRR 3000.2 [a] [2]).

ISSUE

Whether petitioners filed timely requests for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of three notices of deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of two requests for conciliation conference filed by petitioners, Muthana Ikhmayes and Huda Akdeir, with the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting three notices of deficiency, each dated January 7, 2019, and bearing, respectively, assessment identification numbers L-048778118, L-048778119, and L-048778120 (notices). The notices are addressed to petitioners at "902 Rockland Ave Fl 1, Staten Island, New York 10314-7706." In giving their address on the petition, petitioners gave the same address as used on the notices of deficiency.

2. Petitioners filed two separate requests for conciliation conference (requests) with BCMS in protest of the notices. On August 5, 2019, petitioners faxed a request protesting notice number L-048778119 to BCMS. On August 16, 2019, petitioners faxed a second request to BCMS, this one protesting notice numbers L-048778118 and L-048778120. Neither request denied receipt of the notice(s) being challenged.

3. On August 23, 2019, BCMS issued a conciliation order dismissing the August 5, 2019 request challenging L-048778119 (CMS 000313435) to petitioners. The conciliation order determined that petitioner's protest of notice L-048778119 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 7, 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 6, 2019, BCMS issued another conciliation order dismissing on timeliness grounds the August 16, 2019 request challenging notice numbers L-048778118 and L-048778120 (CMS 000313908), stating:

“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 7, 2019, but the request was not received until August 16, 2019, or in excess of 90 days, the request is late filed.”

5. Petitioners filed a petition with the Division of Tax Appeals in protest of both conciliation orders on September 17, 2019. In their petition, petitioners do not deny receipt of the notices.

6. To show proof of proper mailing of the notices, the Division provided the following with its motion papers: (i) an affidavit of Mary Hurteau, Esq., dated May 6, 2020; (ii) an affidavit, dated April 15, 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 “Certified Record for DTF-962-F-E - Not of Def Follow Up” (CMR) postmarked January 7, 2019; (iv) an affidavit, dated April 20, 2020, of Susan Saccocio, the manager of the Division’s mail room; (v) copies of the notices with the associated mailing cover sheets; (vi) a copy of each of petitioners’ requests for conciliation conference; and (vii) a copy of petitioners’ 2017 New York State resident income tax return (form IT-201), dated April 3, 2018, which lists the same address for petitioners as that listed on the notices, except that before the street address and “Fl 1” is the notation “Apt.”

7. Ms. Hurteau’s affidavit asserts that petitioners’ 2017 form IT-201 was filed on April 4, 2018, and is the last return filed by petitioners before the notices were issued.

8. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. The CMR is a computer printout. Each page of the CMR lists an initial date (run date) in the upper left hand corner 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 "1/7/19." 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.

9. 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. 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."

10. The CMR in the present matter consists of 12 pages and lists 154 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 to 14 entries. Ms. Picard 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.

11. A USPS representative affixed a postmark dated January 7, 2019 to each page of the CMR, wrote the number “154” on page 12, under the heading “Total Pieces Received at Post Office,” and initialed or signed page 12.

12. Page 2 of the CMR indicates that three notices were sent to petitioners at the same Staten Island address as on the notices (*see* finding of fact 1) with the following certified numbers and reference numbers:

| Certified Number | Reference Number |
|--------------------------|------------------|
| 7104 1002 9735 4690 7869 | L-048778118 |
| 7104 1002 9735 4690 7876 | L-048778119 |
| 7104 1002 9735 4690 7883 | L-048778120 |

The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear these same certified control numbers and petitioners’ names and address as noted.

13. The affidavit of Susan Saccocio describes the Division’s mail room’s general operations and procedures. Ms. Saccocio has been manager of the Division’s mail room since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. 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. A clerk checks the first and last pieces of mail against the information on the CMR. The clerk 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. According to Ms. Saccocio, the affixation of the USPS postmark on each page of the CMR and the USPS employee's writing "154" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 154 articles of mail listed on the CMR, including the three articles addressed to petitioners, were received by the USPS for mailing on January 7, 2019.

14. According to both the Picard and Saccocio affidavits, a copy of each of the notices was mailed to petitioners on January 7, 2019, as claimed.

15. 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). Because the petition in this matter was filed within 90 days of the conciliation orders (*see* findings of fact 3 through 5), 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 determination 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 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 (*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 (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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the case of a notice of deficiency, proper mailing requires mailing of the notice by registered or certified mail to the taxpayer’s last known address (*see* Tax Law § 681[a]), and it is the Division’s initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

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 petitioner's 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.*).

F. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioners' last known address on January 7, 2019. 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' 2017 form IT-201, which satisfies the "last known address" requirement.² It is therefore concluded that the Division properly mailed the notices on January 7, 2019, 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 (*see* Tax Law §§ 170 [3-a] [a]; 689 [b]). Petitioners' requests for conciliation conference, filed on August 5, 2019, and August 16, 2019, respectively, were thus untimely and properly dismissed by BCMS.

² The address used on the notices here lacked the "Apt" abbreviation that appeared on the address on petitioners' 2017 form IT-201. Petitioners did not use that abbreviation in giving their address on their petition. The error is determined to be inconsequential (*see Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994).

G. The Division's motion for summary determination is granted, the petition of Muthana Ikhmayes and Huda Akdeir is denied, and the August 23, 2019 and September 6, 2019, conciliation orders issued by BCMS are sustained.

DATED: Albany, New York
September 3, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE