

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
YOUSSEF ELGHALIDE :
AND : **DETERMINATION**
JAMILA ELJARDINI : **DTA NO. 829564**
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Tax Under :
Article 22 of the Tax Law and the New York City :
Administrative Code for the Year 2016. :
:

Petitioners, Youssef Elghalide and Jamila Eljardini, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under article 22 of the Tax Law and the New York City Administrative Code for the year 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), brought a motion, dated April 30, 2020, seeking an order dismissing the petition or, in the alternative, 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. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioners, Youssef Elghalide and Jamila Eljardini, protesting a notice of deficiency, dated April 10, 2019, and bearing assessment ID number L-048733586 (notice). The notice is addressed to "ELGHALIDE-YOUSSEF [and] JAMILA-ELJARDINI" at an address in Brooklyn, New York.

2. Petitioners' request was faxed to and received by BCMS on August 5, 2019. Petitioners did not deny receipt of the notice in the request.

3. On August 30, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation order (CMS No. 000313688) determined that petitioners' protest of the 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 April 10, 2019, but the request was not received until August 5, 2019, or in excess of 90 days, the request is late filed."

4. Petitioners filed a petition with the Division of Tax Appeals in protest of the conciliation order. The petition was filed by United States Postal Service (USPS) priority mail, bears a USPS postmark dated September 17, 2019, and there is no dispute that the petition was timely filed.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit of Mary Hurteau, Esq., dated April 28, 2020; (ii) an affidavit, dated April 7, 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 April 10, 2019; (iv) an affidavit, dated April 14, 2020, of Susan Saccocio, a supervisor in the Division's mail room; (v) a copy of the April 10, 2019 notice with the associated mailing cover sheet; (vi) a copy of petitioners' request, faxed to BCMS on August 5, 2019; and (vii) a copy of petitioners' 2018 IT-201 New York State resident income tax return, filed on February 1, 2019, which lists the same Brooklyn, New York, address for petitioners as that listed on the notice, the request for conciliation conference, and the petition. The 2018 income tax return was the last return filed with the Division by petitioners before the notice was issued.

6. 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon, and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case

“20190940635.” 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 “4/10/19.” 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 USPS for mailing, 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. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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.”

8. The CMR in the present matter consists of 5 pages, and lists 51 certified control numbers along with corresponding assessment numbers, names and addresses. In this case, the first, third and fourth pages of the CMR include 12 such entries, the second page includes 13 such entries, and the fifth page which includes 2 such 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.

9. A USPS representative affixed a postmark dated April 10, 2019 to each of the pages of the CMR. That representative handwrote the number “51” immediately to the right of the

preprinted heading “Total Pieces Received at Post Office” on page five, and affixed his or her initials next to the USPS postmark on that page of the CMR. This is consistent with the Division’s stamped instruction to the USPS on page 5, reading “**POST OFFICE** Hand write total # of pieces and initial. **Do Not** stamp over written areas.”

10. Page 3 of the April 10, 2019 CMR indicates that a notice with certified control number 7104 1002 9735 4856 5401 and reference number L-048933586 was mailed to petitioners at the Brooklyn, New York, address listed on the notice. The CMR and the corresponding mailing cover sheet attached to the Picard affidavit bear this same certified control number and petitioners’ name and address as noted.

11. The affidavit of Susan Saccocio describes the Division’s mail room’s general operations and procedures. Ms. Saccocio has been in her position as a manager in the Division’s mail room since 2017, has been employed in the mail room since 2012, 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 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. 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 handwritten number "51" on the last page of the CMR, together with the employee's initialing of that page, indicate that all of the 51 articles of mail listed on the CMR, including the article addressed to petitioners, were received by the USPS for mailing on April 10, 2019.

12. According to both the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioners on April 10, 2019, as claimed.

13. 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 order (*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 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).

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.*, Tax Appeals Tribunal, May 23, 1991).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioners' last known address on April 10, 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' 2018 resident income tax

return, which satisfies the “last known address” requirement. It is therefore concluded that the Division properly mailed the notice on April 10, 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]; 681 [b]; 689 [b]). Petitioners’ request for conciliation conference, filed on August 5, 2019, was therefore untimely, and was properly dismissed by BCMS.

G. The Division’s motion for summary determination is granted, the petition of Youssef Elghalide and Jamila Eljardini is denied, and the August 30, 2019 conciliation order issued by BCMS is sustained.

DATED: Albany, New York
August 27, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE