

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EL MOSTAFA SABOUR AND CHAMCHE DOUHA ELGHERYCH</b>	:	DETERMINATION DTA NO. 829663
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 Administrative Code of the City of New York for the Year 2017.	:	

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Petitioners, El Mostafa Sabour and Chamche Douha Elgherych, 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 Administrative Code of the City of New York for the year 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel) brought a motion dated September 9, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) (1) (i) and (vii), and (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. The 90-day period for issuance of this determination commenced on October 9, 2020. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 for the year 2017.

***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, El Mostafa Sabour and Chamche Douha Elgherych, in protest of a notice of deficiency, dated April 17, 2019, and bearing assessment ID number L-049510284 (notice). The notice is addressed to: "SABOUR-EL MOSTAFA ELGHERYCH-CHAMCHE DOUHA," at a Brooklyn, New York, address. The mailing cover sheet of this notice contains certified control number 7104 1002 9735 4884 3363.

2. Petitioners' then-representative, Yehad Abdelaziz, The Five Pillars, filed a request for conciliation conference (request) with BCMS. Mr. Abdelaziz hand-dated and signed the request on August 5, 2019. On this request, petitioners' Brooklyn, New York, address is listed. The request was filed on August 5, 2019, when it was faxed to BCMS.

3. On August 30, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation order determined that petitioners' protest of the subject 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 17, 2019, but the request was not received until August 5, 2019, or in excess of 90 days, the request is late filed."

4. On October 11, 2019, a petition protesting the conciliation order was filed by petitioners.<sup>1</sup> The United States Postal Service (USPS) Priority Mail Flat Rate Envelope in which the petition was mailed bears a USPS Priority 2-day postage label dated October 11, 2019. The petition lists petitioners' Brooklyn, New York, address. There is no dispute that the petition was filed within 90 days after the August 30, 2019 issuance of the conciliation order and constitutes a timely challenge thereto. In their petition, petitioners do not deny receipt of the notice.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated September 9, 2020, of Maria Matos, Esq., the Division's representative; (ii) an affidavit, dated September 2, 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 "Certified Record For – DTF-962-E – Not of Def DTF-963-F-E – Not of Def Follow Up DTF-963-F-E – Not of Det Follow up" (CMR) postmarked April 17, 2019; (iv) an affidavit, dated September 8, 2020, of Susan Saccocio, a manager in the Division's mail room; (v) a copy of the April 17, 2019 notice with the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference, faxed to BCMS on August 5, 2019; and (vii) 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 lists the same Brooklyn, New York, address for petitioners as that listed on the notice, the request for conciliation conference, and the petition. The 2017 income tax return was the last return filed with the Division by petitioners before the notice was issued.

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<sup>1</sup> Although Mr. Abdelaziz was listed as petitioners' representative on the petition, he does not qualify to represent petitioners before the Division of Tax Appeals under 20 NYCRR 3000.2 (*see* Tax Law § 2014 [1]).

6. The affidavit of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006, and Acting Director since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20191010635." 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 "4/17." 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 and remain so when returned to the Division. The pages 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 "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 9 pages and lists 104 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 12 to 13 such entries, with the exception of page 9 which contains 3 entries. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark dated April 17, 2019 to each page of the CMR. On the last page of the CMR, the USPS employee handwrote "104" on the line next to the preprinted number "104" and the heading "TOTAL PIECES AND AMOUNTS." In addition, the USPS employee initialed or signed on the line next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" on the last page of the CMR.

9. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9735 4884 3363, and reference number L-049510284 was mailed to "SABOUR-EL MOSTAFA ELGHERYCH-CHANCHE DOUHA"<sup>2</sup> at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number, the names "SABOUR-EL MOSTAFA ELGHERYCH-CHAMCHE DOUHA," and the Brooklyn, New York, address as noted.

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<sup>2</sup> The CMR erroneously states Ms. Elgherych's name as Chanche Douha Elgherych rather than Chamche Douha Elgherych. The misspelling of Ms. Elgherych's first name is an inconsequential error. It is noted that Ms. Elgherych's first name is correctly spelled on the notice and the corresponding mailing cover sheet.

10. The affidavit of Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Saccocio has been in this position 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. Ms. Saccocio 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. As noted, each of the 9 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of April 17, 2019. On page 9, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 104 and the handwritten entry "104," indicating 104 pieces of mail were received by the USPS. There is a set of initials or a signature on page 9 on the line next to "TOTAL PIECES RECEIVED AT POST OFFICE."

11. According to the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioners on April 17, 2019, as claimed.

12. 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) (1) 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). As the petition in this matter was timely filed (*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]). "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*). 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, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Std. Metals*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]).

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 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 hearing has not lapsed” (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).

E. Where 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 proper mailing by certified mail of the subject notice, and 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*).”

F. Here, the Division has offered sufficient proof to establish the mailing of the statutory notice to petitioners’ last known address on April 17, 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 on the CMR conform with the address listed on petitioners’ New York State resident income tax return for the year 2017, which satisfies the “last known address” requirement in Tax Law § 681 (a). It is therefore concluded that the Division properly mailed the notice on April 17, 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 on that date (see Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Petitioners’ request for conciliation conference was filed on August 5, 2019. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the August 30, 2019 conciliation 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.

G. The Division of Taxation's motion for summary determination is granted, the petition of El Mostafa Sabour and Chamche Douha Elgherych is denied, and the August 30, 2019 conciliation order issued by BCMS is sustained.

DATED: Albany, New York  
January 07, 2021

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE