

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAFEEK M. KASSIM AND FAIZAH M. SAAD : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 829777
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 Year 2017. :

Petitioners, Rafeek M. Kassim and Faizah M. Saad, 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 year 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), brought a motion, dated October 20, 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 (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, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

¹ The petition listed Yehad Abdelaziz as petitioners' representative. By letter dated December 27, 2019, petitioners were notified that under 20 NYCRR 3000.2 (a) (2), Mr. Abdelaziz did not appear to be a person allowed to represent petitioners before the Division of Tax Appeals (*see* Tax Law § 2014).

ISSUE

Whether petitioners filed a timely request for a 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 a conciliation conference filed by petitioners, Rafeek M. Kassim and Faizah M. Saad, with the Division's Bureau of Conciliation and Mediation Services (BCMS), protesting a notice of deficiency, bearing assessment identification number L-048769615, dated January 3, 2019, (notice). The notice is addressed to petitioners at a Brooklyn, New York, address, with the street address ending "FL 3."

2. Petitioners filed their request for a conciliation conference (request) with BCMS by faxing the same to BCMS, on August 21, 2019. Petitioners' request did not deny receipt of the notice being challenged.

3. On September 13, 2019, BCMS issued to petitioners a conciliation order (CMS 000314091) dismissing the request. The conciliation order determined that petitioners' protest of the notice was untimely because it was received on August 21, 2019, which was more than 90 days after the issuance date of the notice.

4. Petitioners filed a petition with the Division of Tax Appeals in protest of the conciliation order. The petition is dated as signed on December 9, 2019, bears a December 11, 2019 United States Postal Service (USPS) Priority Mail 2-Day date stamp, and is stamped as having been received by the Division of Tax Appeals on December 13, 2019. In their petition, petitioners do not deny receipt of the notice.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided the following with its motion papers:

(i) an affidavit, dated September 28, 2020, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel, concerning her request to the USPS for delivery information; (ii) a Request for Delivery Information/Return Receipt after Mailing (PS Form 3811-A), for the notice; (iii) the USPS response to each such request; (iv) an affidavit, dated September 21, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (v) three pages from a document entitled in part "Certified Record for DTF-962-F-E - Not of Deficiency", with a USPS postmark dated January 3, 2019 (the April 5, 2019 CMR); (vi) an affidavit, dated September 28, 2020, of Susan Saccocio, the manager of the Division's mail room; (vii) a copy of notice number L-004876915 with the associated mailing cover sheet addressed to petitioners; (viii) a copy of petitioners' request for conciliation conference, faxed to BCMS on August 21, 2019, and (ix) a copy of petitioners' New York resident income tax return (form IT-201) for the year 2017, electronically filed on April 15, 2019, which lists the same Brooklyn, New York, address for petitioners as that listed on the notice, the request for conference and the petition. According to Ms. Hink-Brennan's affidavit, the 2017 income tax return was the last return filed with the Division by petitioners before the notice was issued.

6. The affidavit of Deena Picard set 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 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 in the upper right corner of the first and last pages of the CMR submitted in the present case to "1/3/19" and "1/3", respectively, so as to reflect the actual mailing date of "1/3/19." 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.

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. 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 last page of the January 3, 2019 CMR indicates that the CMR consists of 244 pages and lists 2865 certified control numbers, along with corresponding assessment numbers, names and addresses. Only the first page, the last page, and page 151, of the CMR in this case, each of which bears a USPS postmark of January 3, 2019, are attached to the Picard affidavit. Ms. Picard notes that the three pages of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. On page 244, a USPS representative wrote "2865 pcs," under the heading "Total Pieces and Amounts," wrote "244 pgs," under the heading "Total Pieces Received at Post Office," and initialed or signed that page.

9. Page 151 of the January 3, 2019 CMR indicates a notice was sent to petitioners at the same Brooklyn, New York, address as indicated in finding of fact 1, with the certified number 7104 1002 9735 4676 3960 and reference number L-048769615. The corresponding mailing

cover sheet, attached to the Picard affidavit as exhibit “B,” bears that same certified control number and petitioners’ names and address as noted.

10. The affidavit of Susan Saccocio describes the general operations and procedures in the Division’s mail room. Ms. Saccocio has been a manager in the mail room since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room, where they are placed in an “Outgoing Certified Mail” area. Ms. Saccocio 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 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 mail room staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. Under the standard mailing procedures of the Division’s mail room, the receiving USPS employee is asked to affix a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. Specifically, the USPS employee initials or signs the last page of the CMR, and also affixes a postmark to each page of the CMR. Further, and as a part of the Division’s standard mailing procedures, the USPS employee is asked to either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR indicates that the USPS employee complied with this request by handwriting the number of pieces received (2,865), and the number of pages (244), on the last page of the CMR.

11. According to the Picard and Saccocio affidavits, a copy of notice number L-048769615 was mailed to petitioners on January 3, 2019, as claimed.

12. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Form 3811-A is sent to the USPS for mail delivered on or after July 24, 2000. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, and delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail.

13. In this matter, Ms. Corina filed a 3811-A form seeking information about the delivery of the item mailed by the Division to petitioner. Specifically, the form requested information regarding a piece of certified mail that was mailed on January 3, 2019, bearing certified control number 7104 1002 9735 4676 3960 and addressed to petitioner at the Brooklyn, New York, address noted in finding of fact 1. This is the same certified control number on the January 3, 2019 CMR corresponding with the mailing of notice number L-048769615. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 4676 3960 on January 5, 2019 at 2:33 p.m. to the noted Brooklyn, NY address. The scanned image of the recipient's signature as shown on the USPS response is that of petitioner Rafeek Kassim, and the box for the scanned address of the recipient indicates petitioners' specified street address.

14. 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) of the Rules. Because the petition in this matter was filed within 90 days after the September 13, 2019 issuance date of the conciliation order (*see* findings of fact 3 and 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*). In this matter, 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 Keuhne & Nagel, Incl 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 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. 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 (*see 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.

F. 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.*).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, both of whom are Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). However, the Division has submitted only three pages of the CMR for the notice in this matter. The submission of an incomplete CMR, as here, means that the Division has not provided adequate proof that it followed its standard procedure in mailing the notice at issue (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017).

H. When the Division's evidence that it followed its standard mailing procedure is insufficient, the Division can still prevail by providing evidence of actual receipt of the notice in question by the taxpayer. In such a case, the 90-day period within which to protest the statutory notice commences with such the taxpayers' actual receipt of the same (*see Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v Tax Appeals Trib. of State of N.Y.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992], *rearg denied* 80 NY2d 893 [1992]). Here, the Division has submitted the affidavit of Ms. Corina, together with its attached USPS delivery information, as provided by the USPS in response to the Ms. Corina's request for proof of actual delivery of the notice at issue. Specifically, the USPS's response to Ms. Corina's inquiry shows that an item with certified number 7104 1002 9735 4676 3080 was received by petitioners on January 5, 2019. That certified number corresponds to notice number L-048769615. Thus, the Division has established that petitioners actually received notice number L-049769615 on January 5, 2019.

I. By having established that petitioners actually received notice number L-048760615 on January 5, 2019, 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' request for a conciliation conference, filed on August 21, 2019, was thus untimely and was properly dismissed by BCMS.

J. The Division's motion for summary determination is granted, the petition of Rafeek M. Kassim and Fiazah M. Saad is denied, and the September 13, 2019 conciliation order issued by BCMS is sustained.

DATED: Albany, New York
February 11, 2021

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE