

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MUNEER M. YAHYA AND BELKEES A. MUSLIH : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 829805
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, Muneer M. Yahya and Belkees A. Muslih, filed a petition for redetermination of deficiencies 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 August 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, and 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, James P. Connolly, Administrative Law Judge, renders the following determination.

¹ The petition listed Yehad Abdelaziz as petitioners' representative. By letter dated January 23, 2020, the Division of Tax Appeals notified petitioners that Mr. Abdelaziz did not appear to be qualified to represent petitioners in this forum (*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 three requests for conciliation conference filed by petitioners, Muneer M. Yahya and Belkees A. Muslih, with the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting three notices of deficiency, bearing, respectively, assessment identification numbers L-049510255, dated April 5, 2019, L-049510256, dated April 17, 2019, and L-049510257, dated April 17, 2019 (notices). The notices are addressed to petitioners at a Ridgewood, New York, address, with the street address ending "FL 1."

2. Petitioners filed three separate requests for conciliation conference (requests) with BCMS, by faxing to BCMS, on December 11, 2019, three separate requests, each one protesting one of the notices. None of the requests denied receipt of the notice being challenged.

3. On December 27, 2019, BCMS issued to petitioners a conciliation order dismissing all three requests. The conciliation order determined that petitioners' protests of the notices were untimely because the requests were received on December 11, 2019, which was more than 90 days after the issuance of the notices.

4. Petitioners timely filed a petition with the Division of Tax Appeals in protest of the conciliation order on January 2, 2020. In their petition, petitioners do not deny receipt of the notices.

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

a) notice number L-049510255:

(i) an affidavit, dated July 2, 2020, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel, involved in making requests to the USPS for delivery information; (ii) three Requests for Delivery Information/Return Receipt after Mailing (PS Form 3811-A), one for each of the notices; (iii) the USPS response to each such request; (iv) an affidavit, dated July 27, 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 an indistinct postmark that appears to be April 5, 2019 (the April 5, 2019 CMR); (vi) an affidavit, dated July 30, 2020, of Susan Saccocio, the manager of the Division's mail room; (vii) a copy of notice number L-049510255 with the associated mailing cover sheet addressed to petitioners; (viii) a copy of petitioner's request for conciliation conference with regard to notice number L-049510255, faxed to BCMS on December 11, 2019; and (ix) a copy of petitioner's New York resident income tax return (form IT-201) for the year 2018, electronically filed on April 15, 2019, which lists the same Ridgewood, New York, address for petitioners as that listed on the notice, except that the street address on the return has "APT" between "ST." and "1FL." According to Ms. Hurteau's affidavit, the 2018 income tax return was the last return filed with the Division by petitioners before the notice was issued.

b) notices number L-049510256 and L-049510257:

(i) an affidavit of Deena Picard, dated July 27, 2020; (ii) a CMR postmarked April 17, 2019 (the April 17, 2019 CMR); (iii) an affidavit of Susan Saccocio, dated July 30, 2020; (iv) copies of notices number L-049510256 and L-049510257, with the associated mailing cover sheet addressed to petitioners for each notice; (v) a copy of petitioners' request for conciliation conference with respect to each notice, faxed to BCMS on December 11, 2019; (vi) the affidavit of Heidi Corina with attachments as noted earlier (*see* finding of fact 5-a [i]). According to Ms. Hurteau's affidavit, the 2018 income tax return noted earlier was the last return filed with the Division by petitioners before notices number L-049510256 and L-049510257 were issued.

6. The affidavits 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 on the first and last pages of the CMR in the present case to the actual mailing date of "4/5" in the case of the April 5, 2019 CMR, and "4/17" in the case of the April 17, 2019 CMR. 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 April 5, 2019 CMR indicates that the CMR consists of 87 pages and lists 1084 certified control numbers, along with corresponding assessment numbers, names and addresses. The Division attached only the first page, the last page, and page 37, each of which bears a postmark of April 5, 2019. 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. A USPS representative wrote the number

“1084” on page 87, under the heading “Total Pieces Received at Post Office,” and initialed or signed that page.

9. Page 37 of the April 5, 2019 CMR indicates a notice was sent to petitioners at the same Ridgewood, New York, address as indicated in finding of fact 1, with the certified control number 7104 1002 9735 4846 3080 and reference number L-049510255. 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 last page of the April 17, 2019 CMR indicates that the CMR consists of 9 pages and lists 104 certified control numbers, along with corresponding assessment numbers, names and addresses. The Division attached only the first page, the last page, and page 6, each of which bears a postmark of April 17, 2019. 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. A USPS representative wrote the number “104” on page 9, under the heading “Total Pieces Received at Post Office,” and initialed or signed that page.

11. Page 6 of the April 17, 2019 CMR indicates that two notices were sent to petitioners at the same Ridgewood, New York, address as indicated in finding of fact 1, with the certified control numbers 7104 1002 9735 4884 3509 and 7104 1002 9735 4884 3516 and, respectively, reference numbers L-049510256 and L-049510257. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear, respectively, those same certified control numbers and petitioners’ names and address as noted in finding of fact 1.

12. Each of the affidavits of Susan Saccocio describes the mail room’s general operations and procedures. 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 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 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 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 USPS employee initialed or signed the last page of the respective CMRs and affixed a postmark to each page of the respective CMRs. 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. A review of the April 5, 2019 and April 17, 2019 CMRs indicates that the USPS employee complied with this request by handwriting or circling the number of pieces received on the last page of each CMR.

13. According to the Picard and Saccocio affidavits, a copy of notice number L-049510255 was mailed to petitioners on April 5, 2019, and copies of notices number L-049510256 and L-049510257 were mailed to petitioners on April 17, 2019, as claimed.

14. 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. Filing USPS form 3811-A commences a process by which post-

mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail.

15. In this matter, Ms. Corina filed three 3811-A forms seeking information about the delivery of the items mailed by the Division to petitioners. Specifically, the first form requested information regarding a piece of certified mail that was mailed on April 5, 2019, bearing certified control number 7104 1002 9735 4846 3080 and addressed to petitioners at the Ridgewood, New York, address noted in finding of fact 1. This is the same certified control number on the April 5, 2019 CMR corresponding with the mailing of notice number L-049510255. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 4846 3080 “on April 11, 2019 at 4:45 PM Located in Ridgewood, NY 11385.” The scanned image of the recipient’s signature as shown on the USPS response is that of petitioner Muneer M. Yahya. The box for the scanned address of the recipient indicates only “5.”

The second form requested information regarding a piece of mail that was mailed on April 17, 2019 bearing certified control number 7104 1002 9735 4884 3509 and addressed to petitioners at the Ridgewood, New York, address noted in finding of fact 1. This is the same certified control number on the April 17, 2019 CMR corresponding with the mailing of notice number L-049510256 to petitioners on April 17, 2019. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 4884 3509 “on April 20, 2019 at 8:57 AM Located in Ridgewood, NY 11385.” The scanned image of the recipient’s signature as shown on the USPS response is that of petitioner Muneer M. Yahya. The box for the scanned address of the recipient shows only the house number and street name of the address noted in finding of fact 1.

The third form requested information regarding a piece of mail that was mailed on April 17, 2019 bearing certified control number 7104 1002 9735 4884 3516 and addressed to petitioners at the Ridgewood, New York, address noted in finding of fact 1. This is the same certified control number on the April 17, 2019 CMR corresponding with the mailing of notice of deficiency L-049510257 to petitioners on April 17, 2019. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9735 4884 3516 “on April 20, 2019 at 8:57 AM Located in Ridgewood, NY 11385.” The scanned image of the recipient’s signature as shown on the USPS response is that of petitioner Muneer M. Yahya. The box for the scanned address of the recipient shows only the house number and street name of the address noted in finding of fact 1.

16. 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 of the conciliation orders (*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’ requests 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 (*see* 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 (*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.

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. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, the 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 incomplete copies of the CMRs for all the notices in this matter, which means that it has not provided adequate proof that it followed its standard procedure in mailing out the notices in this matter (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017).

G. 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 by the taxpayer of the notice in question. In such a case, the 90-day period in which to protest the statutory notice commences with receipt of the same (*see Matter of 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 affidavit of Ms. Corina and its attached USPS delivery information given in response to the Division's requests provide proof of petitioners' actual receipt of the notices at issue. Specifically, the USPS's response to Ms. Corina's inquiry shows that an item with certified control number 7104 1002 9735 4846 3080 was received by petitioners on April 11, 2019. That certified control number corresponds to notice number L-049510255. Thus, the Division has established that petitioners received notice number L-049510255 on April 11, 2019. Similarly,

the USPS's response shows that items with certified control numbers 7104 1002 9735 4884 3509 and 7104 1002 9735 4884 3516 were received by petitioners on April 20, 2019. Those certified control numbers correspond to, respectively, notices number L-049510256 and L-049510257. Therefore, the Division has also shown that petitioners received notices number L-049510256 and L-049510257 on April 20, 2019.

H. The Division having established that petitioners received notice number L-049510255 on April 11, 2019, and notices number L-049510256 and L-049510257 on April 20, 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 those dates (*see* Tax Law §§ 170 [3-a] [a]; 689 [b]). Petitioners' requests for conciliation conference, filed on August 11, 2019 were thus untimely and properly dismissed by BCMS.

I. The Division's motion for summary determination is granted, the petition of Muneer M. Yahya and Belkees A. Muslih is denied, and the December 27, 2019, conciliation order issued by BCMS is sustained.

DATED: Albany, New York
December 17, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE