

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ABDELKRIM KHAZOULA : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 830038
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 2018. :

Petitioner, Abdelkrim Khazoula, 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 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Maria Matos, Esq., of counsel), brought a motion, dated February 9, 2021, 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. Petitioner, 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 petitioner 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 petitioner, Abdelkrim Khazoula, with the Division's Bureau of Conciliation and Mediation Services (BCMS), protesting a notice of deficiency, bearing assessment identification number L-049782223, dated September 11, 2019 (notice), and asserting additional tax due, plus penalty and interest, for the year 2018. The notice is addressed to petitioner at an Astoria, New York, address.

2. Petitioner filed a request for a conciliation conference (request) with BCMS by faxing the same to BCMS, on June 24, 2020. Petitioner's request did not deny receipt of the notice being challenged.

3. On August 14, 2020, BCMS issued to petitioner a conciliation order (CMS 000321107) dismissing the request. The conciliation order determined that petitioner's protest of the notice was untimely because it was received on June 24, 2020, which was more than 90 days after the issuance date of the notice.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order. The envelope in which the petition was mailed bears an August 31, 2020 United States Postal Service (USPS) postmark, and is stamped as having been received by the Division of Tax Appeals on September 3, 2020. In his petition, petitioner does 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 January 22, 2021, 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); (ii) an eleven page document entitled in part

“Certified Record for DTF-962-F-E - Not of Deficiency”, with a USPS postmark dated September 11, 2019 (CMR); (iii) an affidavit, dated January 28, 2021, of Susan Saccocio, the manager of the Division’s mail room; (iv) a copy of notice number L-049782223 with the associated mailing cover sheet addressed to petitioner; (v) a copy of petitioner’s request for conciliation conference, faxed to BCMS on June 24, 2020, and (vi) a copy of the New York resident income tax return (form IT-201) filed by petitioner and his wife for the year 2018, electronically filed on February 26, 2019, which lists the same Astoria, New York, address for petitioner as that listed on the notice, the request for conference and the petition. According to Ms. Matos’ affidavit, the 2018 income tax return was the last return filed with the Division by petitioner 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 “9/11”, respectively, so as to reflect the actual mailing date of the items of mail set forth thereon. 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 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 September 11, 2019 CMR indicates that the CMR consists of 11 pages and lists 131 certified control numbers, along with corresponding assessment numbers, names and addresses. All pages of the CMR in this case bear a USPS postmark of September 11, 2019. Ms. Picard notes that the 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 11, a USPS representative wrote “131 pcs,” next to the heading “Total Pieces Received at Post Office,” and initialed or signed that page.

9. Page five of the September 11, 2019 CMR indicates a notice was sent to petitioner at the same Astoria, New York, address as indicated in finding of fact 1, with the certified number 7104 1002 9735 5111 4078 and reference number L-049782223. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears that same certified control number and petitioner’s name 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 to place 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 (131) on the last page of the CMR (*see* finding of fact 8).

11. According to the Picard and Saccocio affidavits, a copy of notice number L-049782223 was mailed to petitioner on September 11, 2019, as claimed.

12. Petitioner 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 August 14, 2020 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 petitioner's 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, petitioner did not respond to the Division's motion. Accordingly, he is 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). 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 petitioner's 2018 resident income tax return, which

satisfies the “last known address” requirement. It is therefore concluded that the Division properly mailed the notice on September 11, 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]). Petitioner's request for conciliation conference, filed on June 24, 2020, was therefore untimely, and was properly dismissed by BCMS.

H. The Division’s motion for summary determination is granted, the petition of Abdelkrim Khazoula is denied, and the August 14, 2020 conciliation order issued by BCMS is sustained.

DATED: Albany, New York
May 20, 2021

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE