

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ISRAEL AND SHARON GOLDSTEIN	:	DETERMINATION
	:	DTA NO. 830217
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2018.	:	

Petitioners, Israel and Sharon Goldstein, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), brought a motion dated August 19, 2021, 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) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners, appearing by Cohen, LaBarbera & Landrigan, LLP (Melissa A. Perry, Esq., of counsel) responded to the Division of Taxation's motion on September 15, 2021. The 90-day period for issuance of this determination commenced on September 20, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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 petitioners' protest of a notice of deficiency, dated December 6, 2019, and bearing assessment identification number L-050758514 (notice). The notice was addressed to petitioners, Israel and Sharon Goldstein, at an address in Staten Island, New York.

2. Petitioners filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice by way of facsimile on September 18, 2020. The request includes a fax machine date and time stamp indicating that the faxed transmission of the request was completed on September 18, 2020 at 11:48 a.m. The request indicates that petitioners were requesting a conciliation conference for notice of deficiency number L-050758514, but states that the notice date is September 11, 2020.

3. On October 2, 2020, BCMS issued a conciliation order dismissing request (conciliation order) to petitioners. The conciliation order determined that petitioners' protest of the notices 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 December 6, 2019, but the request was not received until September 18, 2020, or in excess of 90 days, the request is late filed.”

4. Petitioners filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on December 31, 2020.

5. To show proof of proper mailing of the notices, the Division provided the following:
(i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated July 20,

2021; (ii) a certified mail register titled: “CERTIFIED RECORD FOR – DTF – 962-F-E – Not of Def Follow Up ” (CMR) postmarked December 6, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division’s mail room, dated July 22, 2021; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioners; (v) an affidavit of the Division’s attorney, Mary Hurteau, dated August 19, 2021; and, (vi) a copy of the petitioners’ electronically filed New York State personal income tax return (form IT-201) for the year 2018, dated March 26, 2019, which lists the same address for petitioners as that listed on the notice, except that petitioners’ address on the notice includes an additional four zip code digits to petitioners’ five-digit zip code. According to the affidavit of Ms. Hurteau, 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, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is familiar with the Division’s Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with 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, indicated by Julian day of the year and military time of day of “20193342200.” Following the Division’s general practice, this date is manually changed on the first and last page of the CMR to the actual date of mailing of “12-6.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into 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 on the front, and taxpayer assistance information on the back. 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 P.O. ADDRESS."

8. The December 6, 2019 CMR consists of 15 pages and lists 200 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark, dated December 6, 2019 to each page of the CMR, initialed and wrote the number "200" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE".

9. Page 3 of the CMR indicates that a notice of deficiency with certified control number 7104 1002 9735 5322 2542 and assessment ID number L-050758514 was mailed to petitioners at the Staten Island, 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 and petitioners' names and address as noted.

10. The affidavit of Susan Saccocio describes the general operations and procedures of

the Division's mail room. Ms. Saccocio has been a manager in the mail room since 2017 and has been employed there 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. 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 contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained 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 the last page of the CMR and affixed a postmark to each page of the CMR. 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 December 6, 2019 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the CMR.

11. According to the affidavits submitted, the notice was properly mailed to petitioners at their Staten Island, New York, address on the date indicated as claimed.

12. In petitioners' response to the Division's motion, they attached, among other items, a copy of a response to taxpayer inquiry from the Division, dated September 11, 2020 and referencing assessment number L-050758514.

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 (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order, 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*).

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).

E. Where, as here, the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioners’ 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 December 6, 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 conform with the address listed on petitioners' 2018 personal income tax return which satisfies the "last known address" requirement.¹ It is thus concluded that the Division properly mailed the notice on December 6, 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 (Tax Law §§ 170 [3-a] [a]; 681 [b]; 689 [b]). Since the BCMS conciliation conference request form was not filed until September 18, 2020, or well in excess of 90 days from the issuance of the December 6, 2019 notice, the request is untimely, and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of notice.

¹ While it is noted that the Division added four additional zip code digits to petitioners' zip code as reflected on their 2018 personal income tax return filed, such a difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Combemale*, Tax Appeals Tribunal March 31, 1994). Moreover, petitioners do not contend that the notice was improperly addressed, nor do they dispute receipt of the notice. As such, it is deemed admitted that the address on the notice was petitioners' last known address.

G. Petitioners argue that the request for a conciliation conference was timely, contending that the request was in protest of the response to taxpayer inquiry dated September 11, 2020. Contrary to petitioners' argument, a response to taxpayer inquiry is not a statutory notice giving protest rights under the Tax Law. Rather, the notice of deficiency is the statutory notice that must be protested within 90 days from the date of mailing of such notice (*see* Tax Law §§ 681 [b], 689 [b]). As the notice at issue here was issued on December 6, 2019, and petitioners' request was filed more than 90 days thereafter, such request was untimely.

Petitioners further argue that the time for filing the request was tolled pursuant to former Governor Cuomo's Executive Order 202. Executive Order 202.8, dated March 20, 2020, provided, in part, as follows:

“In accordance with the directive of the Chief Judge of the State to limit operations to essential matters during the pendency of the COVID-19 health crises, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule or regulation, or part thereof, is hereby tolled from the date of this Executive Order until April 19, 2020.”²

The language of the Executive Order that states “[i]n accordance with the directive of the Chief Judge of the State to limit operations to essential matters” indicates that such provisions do not apply to administrative procedures by the Division of Tax Appeals, as such procedures are not governed by the Chief Judge of the State (*see* Judiciary Law § 211; Tax Law §§ 2004, 2006).

Moreover, the Tax Appeals Tribunal has noted that the Executive Order does not apply to matters before the Division of Tax Appeals (*see* www.dta.ny.gov [stating “neither the Tribunal

² Executive order 202.67 subsequently extended the date to November 30, 2020.

nor DTA has the authority to waive statutory deadlines. As such, any petition, exception, or request for an extension of time to file an exception must be filed (postmarked or put in the custody of an authorized delivery carrier) by the current statutory deadline”]. As such, petitioners’ argument that the statutory deadline to protest the notice was tolled by the Executive Order is rejected.

Furthermore, even if the Executive Order applied to toll the statutory deadline for protesting a notice, it does not apply retroactively. The Executive Order clearly states that it applies “for the period *from the date of this Executive Order . . .*”, which is dated March 20, 2020 (Executive Order 202.8, emphasis added). Petitioners’ statutory deadline for filing a request with BCMS or a petition with Division of Tax Appeals was 90 days from the notice dated December 6, 2019. As such, petitioners were required to file a protest by March 5, 2020, a date preceding the Executive Order. Accordingly, petitioners’ time to file a protest expired prior to the issuance of the Executive Order and is not tolled thereby.

H. The Division's motion for summary determination is hereby granted, the petition of Israel and Sharon Goldstein is denied and the October 2, 2020 conciliation order dismissing petitioners’ request is sustained.

DATED: Albany, New York
December 16, 2021

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE