

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| UNITED WATER NEW YORK, INC. | : | DECISION |
| | : | DTA NO. 818326 |
| for Revision of a Determination or for Refund of Sales | : | |
| and Use Taxes under Articles 28 and 29 of the Tax Law | : | |
| for the Period March 1, 1993 through November 30, | : | |
| 1999. | : | |

Petitioner United Water New York, Inc., 200 Old Hook Road, Harrington Park, New Jersey 07640, filed an exception to the determination of the Administrative Law Judge issued on June 5, 2003. Petitioner appeared by Piper Rudnick, LLP (Diana L. Erbsen, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Administrative Law Judge properly granted summary determination in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition

with the Division of Tax Appeals within 90 days after the issuance of a notice of determination to petitioner.

II. Whether the Administrative Law Judge should have granted summary determination in favor of petitioner on the ground that the Division of Taxation failed to properly mail the notice of determination to petitioner at its last known address as required by Tax Law § 1147(a)(1).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for the second paragraph of finding of fact “8” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below.

The Division of Taxation (“Division”) issued a Notice of Determination, dated August 4, 2000, to United Water New York, Inc. (“petitioner”) which was addressed as follows: “UNITED WATER NEW YORK INC., R LAMORTE, 200 OLD HOOK RD, HARRINGTON PARK, NJ 07640-1716.” The notice bore assessment identification number L-018323688-2 and assessed sales and use taxes in the amount of \$28,723.22, plus interest of \$12,295.68, for a total amount due of \$41,018.90 for the period March 1, 1993 through November 30, 1999.

On January 8, 2001, the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) received a request for a conciliation conference dated January 2, 2001. The envelope containing the request bore a metered mail postmark of January 3, 2001.

On January 26, 2001, BCMS issued a Conciliation Order Dismissing Request (CMS No. 184400) which stated that since the notice was issued on August 4, 2000, but the request was not received until January 8, 2001, or in excess of 90 days, the request was late filed.

On February 5, 2001, the Division of Tax Appeals received a petition dated February 2, 2001, seeking administrative review of the Conciliation Order Dismissing Request.

In support of its motion for summary determination, the Division submitted: an affidavit of its representative, Michael P. McKinley, Esq.; the Division's answer to the petition; affidavits of Geraldine Mahon, James Baisley, Mary Sauter and Arye Wolkowiski, employees of the Division; a copy of the notice of determination; a copy of the Division's certified mail record ("CMR") for August 4, 2000; a copy of United States Postal Service ("USPS") form 3811-A; and a copy of petitioner's form ST-810 (New York State and Local Sales and Use Tax Return) for the period March 1 through May 31, 2000.

In support of its objection to the Division's motion for summary determination and its cross-motion for summary determination, petitioner submitted: an affirmation of its representative, Diana L. Erbsen, Esq.; copies of the pleadings in this matter; a Statement of Proposed Audit Change for Sales and Use Tax issued to petitioner by the Division on June 19, 2000; a request for conciliation conference, dated December 12, 2000, filed by a sister corporation, United Water New Rochelle and a copy of a notice of determination issued to United Water New Rochelle dated October 31, 2000 which assessed sales and use taxes in the amount of \$146,823.09, plus interest of \$71,294.41, for a total amount due of \$218,117.50 for the period September 1, 1994 through May 31, 1997; and a copy of petitioner's form ST-810 (New York State and Local Sales and Use Tax Return) for the period March 1 through May 31, 2000.

Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's

general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

Ms. Mahon receives a CMR and the corresponding statutory notices generated by CARTS each of which are predated with the anticipated date of mailing. Each notice is assigned a certified control number which is recorded on the CMR under the heading "CERTIFIED NO."

The CMR for the block of statutory notices issued on August 4, 2000, including the notice of determination issued to petitioner, consisted of 24 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the USPS. The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed via certified mail on August 4, 2000, including the notice issued to petitioner, bears certified control numbers which run consecutively. Each page contains eleven entries, with the exception of the last page (page 24) which contains seven entries.

In the upper left hand corner of page 1 of the CMR, the date "07/25/00" was manually changed to "8/4/00." The original date of 07/25/00 was the date that the entire CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from 07/25/00 to 8/4/00 was made by personnel in the Division's Mail Processing Center. The change was made to ensure that the

date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative affixed a postmark to each page of the CMR. Pursuant to the CMR, the total number of statutory notices mailed on August 4, 2000 was 260.

Page 1 of the CMR indicates that a Notice of Determination with notice number L 018323688 was sent to "UNITED WATER NEW YORK INC., R LAMORTE, 200 OLD HOOK RD, HARRINGTON PARK, NJ 07640-1716" by certified mail using control number "P 911 006 285." A U.S. postmark on each page of the CMR is dated August 4, 2000.

In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on August 4, 2000.

James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He is fully familiar with the operations and procedures of the Mail Processing Center and supervises the entire Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a

machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelope. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information listed on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and/or his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. As a matter of standard procedure and to insure accountability, the CMR may be left overnight at the post office to enable the postal employee to process the certified mail and to make the appropriate notations on the CMR. The CMR is then picked up at the post office on the following day by a member of Mr. Baisley's staff whereupon it is then delivered to the CARTS unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

A USPS employee affixed a postmark to each page of the CMR. The last page of the CMR, page 24, indicates that 260 pieces were delivered to the USPS; however, "TOTAL PIECES RECEIVED AT POST OFFICE" is not filled in on the CMR and there is no signature or initials of the USPS employee who received the pieces of mail.

Mary Sauter is employed as a Legal Assistant 1 in the Division's Office of Counsel. As part of her duties, she prepares USPS form 3811-A for mailing. This form is used by the mailer

to request return receipts after mailing and can be used for registered, certified, insured and express mail. Form 3811-A is sent to the U.S. post office where the piece of mail in question was delivered. The USPS employee at that post office fills in form 3811-A based upon delivery records with the name of the individual or organization that received the piece of mail in box 8 and the delivery date of the piece of mail in box 9. In item 12 of form 3811-A are the initials of the USPS clerk who recorded the information on the form. The postmark of the delivery post office is located in item 7. Form 3811-A does not provide the mailer with either the recipient's signature or the delivery address.

We modify the second paragraph of finding of fact "8" to read as follows:

For this petitioner (United Water New York, Inc.), Ms. Sauter prepared a form 3811-A, Request for Return Receipt. Based upon information provided to her by the Office of Counsel, she filled out item numbers 3, 4 and 5 on the form. In item 3, she wrote "United Water New York Inc., R Lamorte, 200 Old Hook Rd, Harrington Park, NJ 07640-1716"; in item 4, she wrote the certified number "P 911 006 285"; and in item 5, she wrote the mailing date of "8/4/00." She also placed an "x" in the box for item 1 "Return receipt WAS NOT paid for at time of mailing" and placed an "x" next to "certified" in item 6.¹

Ms. Sauter mailed form 3811-A and received the form back from the post office with the delivering post office's stamp in item 7, "UWR NJ" handwritten in item 8 ("Delivered to the following individual, company, or organization") and "8-7-00" handwritten in item 9 ("Delivery date"). The USPS clerk's initials were placed in item 12 and the clerk also placed an "x" in the box in item 11 of the form indicating that delivery was made.

¹We modified the second paragraph of the Administrative Law Judge's finding of fact "8" to properly reflect the date indicated in item 5 of form 3811-A.

Arye Wolkowiski is a Tax Auditor II in the Division's Westchester District Office. He was the Team Leader assigned to supervise the sales tax field audit of petitioner for the period March 1, 1993 through November 30, 1999. To refresh his memory of the audit, Mr. Wolkowiski reviewed the audit file and also reviewed the company's business address inquiry database maintained in the Division's Taxpayer Indicative Data System ("TID").

The audit of petitioner was performed in 1999 and 2000, and during the audit, petitioner assigned Robert Lamorte to assist the Division in its review of the books and records. When a Division employee mails a notice to a business, that employee uses the mailing address maintained in TID as the mailing address for the notice. The mailing addresses maintained in TID are based on the filing history of the company unless the company otherwise specifies that the Division use a different mailing address.

Attached to Mr. Wolkowiski's affidavit was a printout from TID labeled "TID REGISTRATION" "BUSINESS ADDRESS INQUIRY" "LEGAL NAME: UNITED WATER NEW YORK INC.". Under SEQ # 004 on the printout is a "0" indicator in the third column from the left labeled "ST" and on the second line of this column labeled "MAIL." The address indicated is: R LAMORTE, 200 OLD HOOK RD, HARRINGTON PARK, NJ 07640-1716. There are also two dates indicated under SEQ# 004, "POSTED: 11/26/1990" and "NOTIFY: 09/30/1990."

Mr. Wolkowiski indicated that the meaning of these dates was that petitioner notified the Division to use the above address for sales tax purposes and that this address was posted to TID by a Division data entry clerk on November 26, 1990.

The address set forth on petitioner's quarterly sales tax return for the period March 1, 2000 through May 31, 2000 was: "United Water New York Inc., 200 Old Hook Rd, Harrington Park, NJ 07640." This was also the address provided by petitioner on its petition filed with the Division of Tax Appeals on February 2, 2001 and was the address to which the Division sent a Statement of Proposed Audit Change for Sales and Use Tax on June 19, 2000.

In response to the Division's motion for summary determination, petitioner submitted the affidavit of its representative, Diana L. Erbsen. On or about December 1, 1999, R. La Morte, who had been an accountant with United Water New York, retired from his position as supervisor of accounting with the company.

During 2000 (and possibly the end of 1999), United Water New York and United Water New Rochelle, Inc., both fully-owned subsidiaries of United Water Resources, Inc., were audited by the Division for compliance with New York State's sales and use tax laws. The two companies were audited by different audit teams out of the same office in Rye Brook, New York, during the same time frame but for different audit periods. Both companies had the same issue identified by the auditors, i.e., the taxability of electricity used to pressurize the mains and pipes to produce pressurized water. Both companies disagreed with the audit findings and responded on form AU-346, Statement of Proposed Audit Change for Sales and Use Tax.

On or about October 10, 2000, United Water New Rochelle received a Notice of Determination from the Division and thereupon filed a timely request for a conciliation conference with BCMS.

Prior to December 31, 2000, petitioner received a Notice and Demand for Payment of Tax Due which alerted the company that "something was wrong" and James Linn, Assistant Vice

President - Taxes of United Water Resources contacted George Marrett, who had performed the audit, to advise him that a Notice and Demand for Payment of Tax Due had been issued without the issuance of a Notice of Determination. Mr. Marrett suggested that Mr. Linn contact BCMS directly, and on January 2, 2001, a request for conciliation conference was sent to BCMS. That request was dismissed as having been untimely. Thereafter, on or about February 2, 2001, a petition was filed with the Division of Tax Appeals.

The last known address of petitioner as set forth on its quarterly sales tax return filed for the period March 1 through May 31, 2000 does not include the name "R LAMORTE," a person who was no longer with the company as of the date of issuance of the Notice of Determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Referring to the rules of the Tax Appeals Tribunal ("Tribunal") for the Division of Tax Appeals, the Administrative Law Judge observed that a motion for summary determination may be granted to either party where, based upon all the papers and proof submitted, "it has been established sufficiently that no material and triable issue of fact is presented . . ." (20 NYCRR 3000.9[b][1]).

The Administrative Law Judge also noted that Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if a return when filed is incorrect or insufficient. Such determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination, or a request for conciliation conference with BCMS, within 90 days of the mailing of the notice (Tax Law

§ 170[3-a][a]). The filing of such a petition or request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals.

The Tax Law requires that the Division, in issuing a Notice of Determination, shall mail it by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable” (Tax Law § 1147[a][1]). The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed” (Tax Law § 1147[a][1]). The Administrative Law Judge found that the record shows that petitioner’s address, on the last return filed by it prior to the issuance of the notice of determination (i.e., the sales tax return for the period March 1 through May 31, 2000) no longer contained the name of its accountant, “R LAMORTE.” However, the first name on the address to which the notice of determination was sent was that of petitioner, United Water New York, Inc. Moreover, the street address (200 Old Hook Road) and the city to which the notice was sent (Harrington Park, New Jersey) were the same. But of even greater importance, the Administrative Law Judge noted, was the fact that petitioner did receive the notice. This is evidenced by the contents of form 3811-A which reveal that the notice was delivered to petitioner on August 7, 2000. The Administrative Law Judge found that the notice was actually delivered to petitioner at its last known address pursuant to the requirements of Tax Law § 1147(a)(1). Accordingly, petitioner’s motion for summary determination on the ground that the notice of determination was not sent to its last known address was denied by the Administrative Law Judge.

The Administrative Law Judge next addressed the timeliness of petitioner's challenge to the Notice of Determination. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing the statutory notice. The mailing evidence required of the Division is two-fold: 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.

In the present matter, the Administrative Law Judge found that the affidavits of two Division employees, Ms. Mahon and Mr. Baisley, provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination. However, the Administrative Law Judge also found that because the CMR was not signed or initialed by the USPS employee and the total number of pieces of certified mail received by the USPS was not entered on the CMR, these documents and affidavits do not establish that the standard mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to this petitioner.

Even though the Division's affidavits and supporting documents failed to establish the date of mailing, the Administrative Law Judge found that the Division satisfactorily proved actual receipt of the notice by petitioner. The Administrative Law Judge found that the affidavit of Division employee Mary Sauter, along with the form 3811-A, establish that the notice of determination was received by petitioner on August 7, 2000. The Administrative Law Judge pointed out that where the exact date of mailing cannot be proved but receipt can be, the statutory period begins to run from the date of receipt (*Matter of Greene Valley Ligs.*, Tax

Appeals Tribunal, November 25, 1992). The Administrative Law Judge determined that the 90-day period for the filing of a request for a conciliation conference or for the filing of a petition in this matter commenced upon receipt of the notice of determination on August 7, 2000 and such period expired on November 5, 2000.

The Administrative Law Judge noted that the Request for Conciliation Conference was dated January 2, 2001, bore a metered mail postmark of January 3, 2001 and was not received by BCMS until January 8, 2001. Even using the earliest of these dates, January 2, 2001, the Administrative Law Judge determined that the request for a conciliation conference would have been made nearly 60 days after the expiration of the statutory period of limitation. The Administrative Law Judge observed that the 90-day period for filing a request for a conciliation conference or a petition for administrative review is absolute. There is no provision in the Tax Law for waiver or extension of such period. The Administrative Law Judge thereupon granted the Division's motion for summary determination and dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner makes the same arguments as were offered below. Specifically, petitioner claims that the subject notice of determination was not mailed to its last known address because it was made to the attention of a former employee. Petitioner argues that its last known address as set forth on its quarterly sales tax return for the period ending May 31, 2000 did not include the name of its former employee, R La Morte, and, therefore, there is no presumption of receipt of the Notice of Determination.

OPINION

The Rules of Practice (20 NYCRR 3000, et seq.) provide that a motion for summary determination may 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 and that the Administrative Law Judge can, therefore, as a matter of law issue a determination in favor of the moving party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (*see*, 20 NYCRR 3000.9[b][1]). A motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to section 3212 of the New York Civil Practice Law and Rules (*see*, 20 NYCRR 3000.9[c]).

Inasmuch 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 v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). Upon such a motion, it is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990).

In this case, we find that there are triable issues of fact in dispute. The Administrative Law Judge found that the Division provided adequate proof of its standard mailing procedures, but failed to show that those procedures were followed with respect to the notice mailed to petitioner.

This was overcome, the Administrative Law Judge found, because the Division had established actual receipt of the notice by petitioner. The Division and the Administrative Law Judge rely on the Request for Return Receipt (form 3811-A) as establishing actual receipt by petitioner.

We find the evidentiary value of form 3811-A, without more, to be ambiguous. In the box indicating the person to whom the mail was delivered, item 8 contains the initials: “UWR NJ.”

Without further evidence establishing whether “UWR NJ” is petitioner, we conclude that there is sufficient ambiguity in the record to warrant granting the parties an opportunity for a hearing for the Division to establish that it properly mailed the subject notice to petitioner and/or petitioner’s actual receipt of the notice. Petitioner, similarly, will have the opportunity to establish that no such mailing occurred or a lack of actual receipt. The Division’s motion for summary determination is denied and petitioner’s cross motion for summary determination is also denied.

We reverse the determination of the Administrative Law Judge and remand the matter for a hearing consistent with our decision herein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of United Water New York, Inc. is granted;
2. The determination of the Administrative Law Judge granting summary determination is reversed; and

3. The Division of Taxation's motion for summary determination is denied and the matter is remanded for a hearing on the issue of timeliness of the petition.

DATED: Troy, New York
April 1, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner