

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

GANIN TIRE COMPANY, INC. :

DECISION
DTA NO. 823541

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 December 1, 2003 through November 30, 2008. :

Petitioner, Ganin Tire Company, Inc., filed an exception to the determination of the Administrative Law Judge issued on November 24, 2010. Petitioner appeared by Allan D. Povol, CPA. The Division of Taxation appeared by John E. Matthews, Esq.

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination, dated April 1, 2009. The Notice is addressed to petitioner and bears assessment identification number L-031733400.

On November 25, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the Notice of Determination, dated April 1, 2009.

On December 18, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order, bearing CMS number 236206, determined that petitioner's protest of the Notice of Determination, dated April 1, 2009, was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on April 1, 2009, but the request was not mailed until November 25, 2009, or in excess of 90 days, the request is late filed.

To show proof of proper mailing of the Notice of Determination, dated April 1, 2009, the Division provided the following: (i) an affidavit, dated July 30, 2010, of Dean Badar, a tax auditor in the Division's Field Audit Management Unit (FAM); (ii) a Certified Mail Record (CMR), postmarked April 1, 2009; (iii) a copy of a United States Postal Service (USPS) receipt, dated April 1, 2009, indicating payment of certified mail postage, and a certified mail receipt; (iv) an affidavit, dated August 2, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the USPS for delivery information; (v) a Request for Delivery Information/Return Receipt after Mailing (PS Form 3811-A); and (vi) the USPS response to such request, dated July 15, 2010.

The affidavit of Dean Badar states that, in April 2009, it was the practice of the Division, under certain circumstances, to pull notices of determination for manual review and to prepare

CMRs for such notices. Notices so selected were sent to FAM by the Division's Case and Resource Tracking System control unit (CARTS). The Notice at issue, bearing assessment identification number L-031733400, was a Notice selected for such manual review. As part of the standard procedure, when a notice is pulled for manual review, Mr. Badar personally prepared a CMR. The CMR is a listing of taxpayers and representatives to whom statutory notices are sent by certified mail on a particular day. The CMR relevant to this matter, as prepared by Mr. Badar, is a facsimile of USPS Form 3877 and consists of two pages. The first page contains three entries, with a separate certified mail control number assigned to each, listing three addresses to which a copy of Notice L-031733400 was to be mailed. The second page of the CMR contains a handwritten number "3" under the heading "Total Number of Pieces List [sic] by Sender" and a handwritten and circled "3" under the heading "Total Number of Pieces Received at Post Office." Next to those entries under the heading "Postmaster, Per (Name of receiving employee)" are the handwritten initials of a Postal Service employee. Both pages of the CMR bear the stamp of the Stuyvesant Plaza branch of the USPS, located in Albany, New York, dated April 1, 2009.

Two of the three entries on the CMR list petitioner as the addressee, one with a Brooklyn, New York, street address and the other a Bronx, New York, street address. The Brooklyn street address is the address listed on petitioner's sales and use tax return for the quarter ended May 31, 2007. This was the last return filed by petitioner prior to the mailing of the subject Notice. The Bronx street address was used by petitioner on earlier sales tax returns.

The remaining entry on the CMR lists an address for petitioner's representative as follows: Paul Feldman, Povol and Feldman, CPA, P.C., 1981 Marcus Ave., Ste. C100, New Hyde Park, NY, 11042-1032.

Mr. Badar personally inserted a copy of the subject Notice along with a cover letter into envelopes bearing each of the three addresses noted above and the certified control number assigned to each such address.

Mr. Badar personally hand-delivered the sealed envelopes and the CMR to the Stuyvesant Plaza branch of the USPS on April 1, 2009. At that point, a Postal Service employee affixed the date stamp, entered the total number of pieces received number and wrote his or her initials in the appropriate space as described above (*see* Finding of Fact above). Postal fees were paid at that time and Mr. Badar received a receipt, dated April 1, 2009, indicating payment for certified mail postage in respect of three articles of mail bearing the three certified control numbers listed on the CMR.

The affidavit of Heidi Corina describes the Division's request to the Postal Service for delivery information on the April 1, 2009 Notice of Determination addressed to petitioner's representative. Specifically, the Division used a PS Form 3811-A to request delivery information with respect to an article of mail bearing the certified control number associated with the notice addressed to petitioner's representative (*see* Finding of Fact above). The USPS response, dated July 15, 2010, indicates that such article was delivered, as addressed, to 1981 Marcus Ave, Ste. C100, New Hyde Park, NY 11042, on April 3, 2009.

Petitioner filed a timely Request for Conciliation Conference with BCMS in connection with a sales and use tax matter involving the period December 1, 2003 through May 31, 2008. BCMS assigned this matter CMS number 233283.

A workpaper transmitted by the Division's Metro Audit Group to petitioner's representative on June 30, 2010, details a sales tax error rate and projection of additional tax due from petitioner for the period December 1, 2003 through November 30, 2008.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination may be granted if it has been sufficiently established that no material and triable issue of fact is presented and that the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party.

The Administrative Law Judge pointed out that where the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the notice to petitioner's last known address pursuant to Tax Law § 1138(a)(1). To prove the fact and the date of mailing of the subject Notice, the Administrative Law Judge noted that the Division must provide 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 proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge found that the Division had offered proof sufficient to establish the mailing of the statutory notice on April 1, 2009, to petitioner's last known address. As a result, the Administrative Law Judge found that the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on April 1, 2009.

The Administrative Law Judge determined that the request for a conciliation conference was not filed until November 25, 2009, which was well beyond the 90-day period. The Administrative Law Judge noted petitioner's claim that the April 1, 2009 Notice of Determination overlaps and duplicates a prior notice of determination that is currently pending at BCMS (CMS 233283). The Administrative Law Judge rejected petitioner's contention that the

instant matter should be suspended pending the resolution of CMS 233283. The Administrative Law Judge concluded that, absent the timely protest of the April 1, 2009 Notice, the Division of Tax Appeals has no jurisdiction over this matter and therefore lacks authority to remand or suspend the present matter. The Administrative Law Judge granted summary determination in favor of the Division and dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that there is a material issue of fact to be decided. Petitioner asserts that the Notice of Determination in this case duplicates periods under review in a different Notice of Determination, which is currently at BCMS. Petitioner argues that the Notice of Determination at issue should be cancelled and combined with the Notice of Determination currently at BCMS.

The Division argues that the Administrative Law Judge correctly decided the relevant issues and that the order should be affirmed.

OPINION

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to the person liable for the collection or payment of sales and use tax, which will become an assessment unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a notice of determination is to be mailed 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.”

A notice of determination is mailed when it is delivered into the custody of the United States Postal Service for mailing (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When the timeliness of a petition is at issue, the Division must establish proper mailing of the notice of determination to petitioner (*see Matter of Novar TV & Air Conditioner Sales & Serv., supra*). We find that the Division has met its burden to establish proper mailing of the Notice of Determination to petitioner on April 1, 2009, by submitting affidavits describing its general mailing procedures and the relevant mailing record, which showed that the procedure was followed in this case (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

We next address petitioner's argument that material questions of fact are raised because the Notice of Determination in this case duplicates periods under review in a different Notice of Determination currently at BCMS. As the Administrative Law Judge noted, section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, 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 any party (20 NYCRR 3000.9[b][1]).

That section further provides that a motion for summary determination is subject to the same provision 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 [1980]).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).

In this case, the Administrative Law Judge determined that the Division had proven both the fact and date of mailing of the Notice of Determination dated April 1, 2009. Based upon our review of the record herein, we agree with his conclusion. Petitioner's attempt to raise substantive issues is precluded by its failure to establish that it timely filed a petition that would confer jurisdiction upon the Division of Tax Appeals to deal with such issues. Further, petitioner has not presented any arguments on exception that are relevant to the issue of timeliness. Although we do not have jurisdiction to address this matter, if the assessment in issue is indeed under review at BCMS, as alleged by petitioner, we are confident that BCMS will take appropriate action with regard to the taxes due. As the Administrative Law Judge adequately and correctly addressed the issue presented to him, we affirm the determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ganin Tire Company, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Ganin Tire Company, Inc. is dismissed.

DATED:Troy, New York
July 14, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner