

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

JEFF ZEGANS :

DECISION
DTA NO. 823543

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, 2006 through November 30, 2008. :

Petitioner, Jeff Zegans, filed an exception to the determination of the Administrative Law Judge issued on December 2, 2010. Petitioner appeared by Allan Poval, CPA. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his 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 June 8, 2009. The notice is addressed to

petitioner's Hewlett, New York, address and bears assessment identification number L-032028649-8.

Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated November 24, 2009, in protest of the Notice of Determination, which was received by BCMS on November 27, 2009.

BCMS issued a Conciliation Order Dismissing Request to petitioner, dated December 18, 2009. The order, bearing CMS number 236208, determined that petitioner's protest of the Notice of Determination dated June 8, 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 June 8, 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 June 8, 2009, the Division provided the following: (i) an affidavit of John E. Matthews, Esq., representing the Division in this matter; (ii) the petition filed by petitioner on March 11, 2010; (iii) the Division's answer; (iv) an affidavit, dated August 2, 2010, of James Steven VanDerZee, the head mail and supply supervisor in the registry unit of the Division; (v) an affidavit, dated July 26, 2010, of Patricia Finn Sears, the supervisor of the refunds, deposits, overpayments and control units of the Division, including the CARTS control unit; (vi) a Certified Mail Record (CMR) postmarked June 8, 2009; (vii) the Notice of Determination issued to petitioner, dated June 8, 2009; (viii) the BCMS conciliation order (CMS No. 23608), dated December 18, 2009; (ix) petitioner's request for conciliation conference, dated November 24, 2009; and (x) petitioner's Form IT-201, New York State Resident Income Tax Return for 2007, dated October 13, 2008.

The affidavit of Ms. Sears sets forth the Division's specific steps, as well as its general practice and procedure for processing statutory notices prior to their shipment to the Division's mail processing center for mailing. She established that the procedures followed were the normal and regular procedures of the CARTS control unit. She explained that the CMR for statutory notices issued on June 8, 2009 shows that a Notice of Determination, dated June 8, 2009, with reference to assessment number L-032028649, was sent to petitioner by certified mail, using certified control number 7104 1002 9730 1349 5271, on June 8, 2009, as indicated by an affixed United States Postal Service postmark.

The affidavit of James Steven VanDerZee, the mail and supply supervisor, describes the operations and procedures followed by the mail processing center, as follows. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of Mr. VanDerZee's staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service (USPS) in the Albany, New York, area. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record, indicating receipt by the post office. Here, the postal employee affixed a postmark to the certified mail record, initialed the CMR, and wrote in the total number of pieces of certified mail received. This CMR indicates that a total of 174 pieces of mail were delivered to the USPS. Based upon Mr. VanDerZee's review of the affidavit of Ms. Sears, the CMR and the Notice of Determination, he concluded that one piece of certified mail addressed to petitioner at the same address listed on the Notice of Determination was delivered to the USPS in Albany, New York, on June 8, 2009.

Petitioner's Hewlett, New York, address on the CMR and the mailing cover sheet of the Notice of Determination matches the address listed on petitioner's 2007 resident income tax return, Form IT-201, dated October 13, 2008. According to the Division's records, this was petitioner's last known address when the notice under protest was issued.

Petitioner filed a timely Request for Conciliation Conference with BCMS in connection with a separate sales and use tax matter involving the period March 1, 2006 through May 31, 2008. BCMS assigned this matter CMS number 233314.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her 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 carried its burden of demonstrating proper mailing of the notice to petitioner's last known address pursuant to Tax Law § 1147(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 June 8, 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 June 8, 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 June 8, 2009 Notice of Determination overlaps and duplicates a prior notice of determination that is currently pending at BCMS (CMS 233314). The Administrative Law Judge rejected petitioner's contention that the instant matter should be suspended pending the resolution of CMS 233314. The Administrative Law Judge concluded that absent the timely protest of the June 8, 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 June 8, 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 June 8, 2009. Based upon our review of the record herein, we agree with her conclusion. Petitioner’s attempt to raise substantive issues is precluded by his failure to establish that he 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, or an assessment for the same taxes for the same periods, are 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 her, we affirm the determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jeff Zegans is denied;

2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Jeff Zegans 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