

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BETTY M. CHUNG : DECISION
 : DTA NO. 823675
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods June 1, 2008 through November 30, 2008 and :
March 1, 2009 through May 31, 2009. :
:

Petitioner, Betty M. Chung, filed an exception to the determination of the Administrative Law Judge issued on February 24, 2011. Petitioner appeared by Barry Leibowicz, Esq. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief 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 notices of determination.

FINDINGS OF FACT

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

The Division of Taxation (Division) issued to petitioner, Betty M. Chung, at her Douglaston, New York, address, three notices of determination, each dated November 19, 2009. The first, Notice of Determination number L-033020398-4, asserts sales and use taxes due in the amount of \$34,567.57, plus penalty and interest, less assessment payments/credits of \$249.00, for the period June 1, 2008 through August 31, 2008. The second, Notice of Determination number L-033020397-5, asserts sales and use taxes due in the amount of \$64,233.65, plus penalty and interest, for the period September 1, 2008 through November 30, 2008. The third, Notice of Determination number L-033020396-6, asserts sales and use taxes due in the amount of \$45,206.08, plus penalty and interest, for the period March 1, 2009 through May 31, 2009.

On March 30, 2010, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). The envelope in which the request was sent by certified mail bears a machine metered (Pitney Bowes) postmark dated March 30, 2010. This unsigned request listed all three notices of determination at issue and petitioner's address as Douglaston, New York.

On April 16, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices 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(s) was issued on November 19, 2009, but the request was not received until April 1, 2010, or in excess of 90 days, the request is late filed.

In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The petition lists petitioner's address again as Douglaston, New York. The Division

subsequently brought this motion, dated October 29, 2010, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction over the matter because petitioner's protest of the statutory notices was filed more than 90 days from their date of issuance.

In support of its motion for summary determination, the Division submitted: copies of the petition, the amended petition and the envelope in which the amended petition was sent by certified mail; copies of an undated Request for Conciliation Conference received by BCMS on April 1, 2010 and the envelope bearing the machine metered postmark dated March 30, 2010, in which the request was mailed; a copy of the Conciliation Order Dismissing Request; a transcript of the joint New York State Resident Income Tax Return (form IT-201) for the year 2007 electronically filed by petitioner and her husband on October 3, 2008, which was the last tax return filed prior to the issuance of the Notices of Determination; a copy of the "Certified Record for Presort Mail - Assessment Receivable" (CMR) postmarked November 19, 2009; copies of the Notices of Determination and the accompanying mailing cover sheets; the affidavit of John E. Matthews, Esq., the Division's representative; and the affidavits of Bruce Peltier and Patricia Finn Sears, employees of the Division.

Patricia Finn Sears is employed as a supervisor in the Division's Case and Resource Tracking System (CARTS) Control Unit. Her duties include supervising the processing of notices of determination, such as the ones at issue herein. Ms. Sears's affidavit sets forth the Division's general practice and procedure for processing statutory notices, as follows. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 20-page CMR lists an

initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "11/19/09," to reflect the actual mailing date. In addition, the initial date on the last page was also manually changed to "11/19/09." Each notice is assigned a certified control number. The certified 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 numbers, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The tenth page of the CMR contains information on the subject notices and establishes that on November 19, 2009 three Notices of Determination, bearing notice numbers L-033020396, L-033020397 and L-033020398 and control numbers 7104 1002 9730 1686 3275, 7104 1002 9730 1686 3282 and 7104 1002 9730 1686 3299, respectively, were sent to petitioner at her Douglaston, New York, address.

The affidavit of Bruce Peltier, a mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures, as follows. As a mail and supply supervisor, he supervises the Center's staff. The Mail Processing Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice and associated documents into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes

against information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated CMR to one of the various branch offices of the United States Postal Service (USPS) located in the Albany, New York, area. The USPS has also been requested by the Mail Processing Center to either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

The postal service representative affixes a USPS postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR. In the case of the certified mail to be mailed on November 19, 2009, the USPS employee initialed or signed each page of the CMR, affixed a postmark dated November 19, 2009 to each page of the CMR and wrote and underlined the total number of pieces of certified mail received as 210 on page 20 of the CMR. Page 20 of the CMR originally listed 211 pieces of mail; however, the number of pieces received at the post office indicates 210, in order to reflect the fact that one piece of certified mail had been “pulled” from the mailing record. A piece of mail may be pulled for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pulled piece of mail is segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the CMR in this case indicates that a piece of mail listed on page 19 of the CMR was pulled. A line was appropriately placed through the entry for this taxpayer after the statutory notice was pulled. This deletion is reflected in the change of the total pieces received at the post office on page 20 of the CMR. The USPS postmark on each page of

the CMR is from the Colonie Center branch and bears the date November 19, 2009, confirming that 210 notices were mailed on that date.

Petitioner's Douglaston, New York, address on the CMR and the mailing cover sheets matches the address listed on the joint 2007 New York State personal income tax return electronically filed by petitioner and her husband on October 3, 2008 (i.e., the last return filed prior to the issuance of the subject notices of determination), on the Request for Conciliation Conference, and on the petition.

The Request for Conciliation Conference and the petition each bore petitioner's address in Douglaston, New York.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that any party may bring a motion for summary determination by submitting an affidavit, made by a person having knowledge of the facts, which demonstrates that there is no material issue of fact and that the facts mandate a determination in the moving party's favor.

The Administrative Law Judge noted that Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination for additional tax or penalties due under Articles 28 and 29. Further, the Administrative Law Judge pointed out that a taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination or, alternatively, file a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination. The Administrative Law Judge observed that the Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit.

Where timeliness of the petition is at issue, the Administrative Law Judge noted that the initial inquiry must focus on the issuance of the notice. The Administrative Law Judge observed that the burden of demonstrating proper mailing rests with the Division. Where a notice is found to have been properly mailed, the Administrative Law Judge noted that a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. The Administrative Law Judge cited case law that established that the Division may meet its burden of showing proper mailing by producing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing of the notice at issue.

The Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Peltier and Ms. Sears. Further, the Administrative Law Judge concluded that the Division provided sufficient documentary proof to establish that the Notices of Determination, dated November 19, 2009, were mailed as addressed to petitioner. The Administrative Law Judge pointed out that each page of the 20-page CMR bore a USPS postmark dated November 19, 2009. The Administrative Law Judge concluded that the postal service employee handwrote the number “210” near the “Total Pieces Received At Post Office” heading and initialed the last page near the underlined number, indicating that all 210 pieces listed on the CMR were received at the post office.

The Administrative Law Judge found that the Division had offered proof sufficient to establish the mailing of the statutory notices on November 19, 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 November 19, 2009. Accordingly, the Administrative Law Judge

determined that the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's petition. The Administrative Law Judge granted summary determination in favor of the Division and dismissed the petition.

The Administrative Law Judge pointed out that petitioner is not entirely without recourse. Petitioner may pay the tax assessment and file a claim for refund. If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the CMR was defective in that 210 of the 211 pieces of mail were received at the post office. Petitioner also argues that the Notices were not mailed to petitioner at her last known address. Petitioner contends that the Division did not set forth an established procedure governing when and how a statutory notice is pulled from the CMR and that the affidavit submitted by a Division employee is made without actual knowledge as to the facts at issue.

OPINION

We affirm the determination of the Administrative Law Judge.

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that 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 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]).

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 [1980]).

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.

Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it mailed the notice of deficiency at issue to the taxpayer at his last known address (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The Division must prove both the fact and date of mailing of the notice at issue (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the postal service for mailing (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*Matter of Katz, supra*). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (*see Matter of MacLean v. Procaccino*, 53 AD2d 965 [1976]).

In this matter, we agree with the Administrative Law Judge that the Division presented a *prima facie* case warranting summary determination in its favor. The Division's proof in this case consists of the affidavits of Bruce Peltier and Patricia Finn Sears, which were offered to establish the general procedure for the mailing of Notices of Deficiency and Notices of Determination pursuant to Tax Law § 1138, and compliance with that general procedure for mailing the notices at issue herein. Exhibit "A" of the Peltier and Sears affidavits (collectively referred to hereinafter as "exhibit 'A'") contains a total of 20 pages of a CMR. This CMR was offered to establish that the Division's mailing procedure was followed in this particular instance and is a crucial piece of evidence in this proceeding.

We conclude that exhibit "A" of the Peltier and Sears affidavits shows that the procedure articulated by the Division's affiants was followed. The Division's affiants describe a procedure that allows each page of the CMR to be associated with the other pages: the pages are connected when they are delivered to the USPS and remain connected when they are returned to the unit that generated the CMR (the CARTS Control Unit) and the certified mail numbers run consecutively from page to page. Moreover, the number of pieces of mail listed on the CMR is totaled at the bottom of the last page and a postal employee enters the actual number of items received by the USPS and signs or initials the certified mail record. The entries at the end of the CMR demonstrate that each item listed on the certified mail record was delivered to the custody of the USPS on the date stamped on the certified mail record with the exception of one item that was pulled from the mailing, as indicated on pages 19 and 20 of the CMR.

This procedure, as described by the Division's affiants, seeks to establish that the Division has a method "to ensure that the integrity of the certified mail record is maintained from the time

that the document is generated, delivered to the Postal Service and returned to the custody of the Division” (*Matter of Greene Valley Liqs.*, Tax Appeals Tribunal, November 25, 1992).

The 20 pages of exhibit “A” of the Peltier and Sears affidavits appear to be physically connected and the pages are consecutively numbered. As a result, it can be inferred that pages numbered 1 through 20 of the CMR are from the same CMR. Further, we conclude that page 10 of the CMR, where petitioner’s name appears, bears both the date stamp of November 19, 2009 and the post office employee’s initials. Accordingly, it can be concluded that the Notices of Determination were mailed to petitioner on November 19, 2009. Contrary to petitioner’s position, incorrect references in the Peltier affidavit to the certified mail number and page in the CMR constitute harmless error when the CMR itself is otherwise complete, including a proper mail count, as well as stamps and initials on the last and relevant pages (*see e.g. Matter of Titanium Construction Corp.*, Tax Appeals Tribunal, May 5, 2011; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

Delivery of a particular item listed in the CMR is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed; i.e., by entering the number of pieces of mail received in the space provided for that entry. A USPS date stamp alone placed on one or more pages of the CMR is not sufficient (*see Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *see also Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995).

In this case, a postal service employee crossed out “211,” handwritten and underlined the number “210” corresponding to “The Total Pieces Received At Post Office” heading and initialed the last page next to the underlined number, indicating that 210 pieces were received at the post office. The CMR originally indicated that 211 pieces of mail were on the CMR. However, page 19 shows that a line was drawn through one of the pieces of mail, thereby indicating that the particular item was deleted from the mailing record for other reasons. We note that the piece of mail that was pulled from the mailing record was not one of the Notices issued to petitioner. Accordingly, we agree with the Administrative Law Judge that the CMR has been properly completed and constitutes documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

We next address petitioner’s argument that she never received the Notices of Determination at her last known address. Pursuant to Tax Law § 1147(a)(1), a notice of determination is 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.” We agree with the Administrative Law Judge that the last personal income tax return filed on October 3, 2008, listed petitioner’s address as Douglaston, New York. As such, the Division has shown that the Notices of Determination were properly mailed to petitioner at her last known address on November 19, 2009. Petitioner offers only bare assertions, which are insufficient to rebut the presumption of receipt (*Matter of T.J. Gulf. v. State Tax Commn.*, 124 AD2d 314 [1986]).

We reject petitioner's argument that the affidavit submitted by the Division's employee is made without actual knowledge as to the facts at issue. To show that a notice was properly mailed to the taxpayer by certified or registered mail, the Division must provide evidence only as to the general mailing procedure of such notice and that this procedure was followed when mailing the notice in question (*Matter of MacLean v. Procaccino, supra; Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra; Best Ray Pizza*, Tax Appeals Tribunal, May 16, 1996). Accordingly, we find that the Division has maintained the integrity of the CMR by entering into evidence the entire multi-page CMR that was presented to the USPS.

As petitioner's request for a conciliation conference was not mailed until March 30, 2010, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

We have reviewed and considered the remainder of petitioner's arguments and find them equally without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Betty M. Chung is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Betty M. Chung is dismissed.

DATED: Troy, New York
September 22, 2011

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

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