

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAYMOND AZZATO : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 823185
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2002 through November 30, 2005. :

Petitioner, Raymond Azzato, filed a petition 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, 2002 through November 30, 2005.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated February 17, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, by his representative, Douglas J. Lerosé, Esq., timely filed a response to the Division of Taxation's motion on May 26, 2010, after having been granted two extensions of time to do so. Accordingly, the 90-day period for the issuance of this determination began on May 26, 2010, the date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy Alston, Administrative Law Judge, renders the following determination.

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

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated October 14, 2008 and addressed to petitioner, Raymond Azzato, at a Great River, New York, address. The Notice of Determination assesses a total amount due of \$196,935.47, which is comprised of interest and penalty for the period March 1, 2002 through November 30, 2005. In explanation, the notice states that it is being issued because petitioner is liable as an officer or responsible person of Island Auto Stop, Inc. The notice bears assessment identification number L-030757584-1 and the corresponding "Mailing Cover Sheet" bears petitioner's name and a Great River, New York, address and certified mail control number 7104 1002 9730 0865 3600.

2. On April 20, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination.

3. On May 8, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination 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 October 14, 2008, but the request was not received until April 20, 2009, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the notice dated October 14, 2008, the Division provided the following: (i) an affidavit, dated February 12, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated February 9, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked October 14, 2008; and (iv) a transcript of petitioner's electronically filed New York personal income tax return for the year 2007, filed April 15, 2008.

5. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. 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 211-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, the upper left corner of the first page of the CMR contains the handwritten date "10/14/08" to reflect the actual mailing date. 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 number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." Page 128 of the CMR contains information on the subject notice and establishes that on October 14, 2008 a notice with the control number 7104 1002 9730 0865 3600 was sent to petitioner at a Great River, New York, address, which is the

same as that listed on petitioner's 2007 income tax return, which was electronically filed on April 15, 2008.

6. The affidavit of James Steven VanDerZee describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The 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 into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail 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 the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (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 Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a postmark dated October 14, 2008 on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 2,315. Below this number, "-8" and "2,307" have been handwritten to reflect the fact that 8 pieces of mail have been "pulled" from the CMR, thus leaving 2,307 pieces mailed. The removal of these pieces is reflected on the CMR by a line drawn through the entries for these eight items. No such line is drawn through the entry for the subject notice. A USPS employee has initialed the final

page of the CMR and has handwritten "2,307," confirming that 2,307 notices were mailed on that date.

7. Petitioner's Great River, New York, address on the CMR and Mailing Cover Sheet matches the address reported on his personal income tax return for 2007, which as noted, was electronically filed on April 15, 2008. This is the last return that petitioner filed with the Division before the issuance of the subject notice of determination.

8. Petitioner's response to the Division's motion included an affidavit of petitioner, Raymond Azzato, dated May 21, 2010. In his affidavit petitioner alleged that the Notice of Determination dated October 14, 2008 "was never received by me or anyone authorized to accept such notice on my behalf." Petitioner further alleged that he had no notice of the subject assessment until more than 90 days from the mailing date of the Notice of Determination.

9. Petitioner's affidavit and the affidavit of petitioner's representative, which was also submitted in opposition to the Division's motion, make reference to certain exhibits attached thereto, specifically: a Notice of Cancellation dated May 5, 2008 in respect of a corporation franchise tax assessment against Island Auto Stop, Inc.; a Notice of Adjustment dated May 5, 2008 with respect to Island Auto Stop, Inc.'s corporation tax liability, showing a credit of \$57.13; a filing receipt from the New York State Department of State indicating a filing dated May 8, 2008 in connection with the dissolution of Island Auto Stop, Inc.; and a remittance advice in respect of a refund check dated May 2, 2008 issued in connection with a refund from the New York State Department of Motor Vehicles.

10. Petitioner acknowledged in his affidavit that the Great River address on the statutory notice was his home address.

CONCLUSIONS OF LAW

A. 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]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). 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 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [2d Dept1989]). 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, 206 NYS2d 879 [2d Dept1960]).

C. “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,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or

assertions are insufficient” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1st Dept 1992] *citing Zuckerman*).

D. Where, as here, 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 by certified or registered mail to petitioner’s last known address (Tax Law § 1138[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., October 14, 2008, to petitioner’s last known address. The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002). Additionally, the CMR has been properly completed and is therefore documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Further, the address on the Mailing Cover Sheet and the CMR conforms with the address reported on petitioner’s 2007 personal income tax return, conceded by petitioner as his residence. This satisfies the “last known address” requirement in Tax Law § 1138(a)(1) and § 1147(a)(1). Accordingly, the notice was properly mailed, and thus, 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 October 14, 2008 (Tax Law § 170[3-a][a]; § 1138[a][1]).

F. Tax Law § 1147(a)(1) provides that the mailing of a notice of determination “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” The mere denial of receipt is insufficient to rebut this presumption (*see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97 [3d Dept 1986]; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Petitioner’s denial of receipt as asserted in his affidavit (*see* Finding of Fact 8) thus fails to overcome the presumption of receipt.

G. Petitioner’s contention that the subject notice should have been addressed to him at the corporation’s place of business is disingenuous. As petitioner’s documents indicate (*see* Finding of Fact 9), the corporation was dissolved when the notice was issued on October 14, 2008.

H. Petitioner’s complaint that the Division did not obtain a return receipt from the USPS in connection with the mailing at issue is without merit. Tax Law § 1138(a)(1) requires that notices of determination be mailed by certified or registered mail. That section does not require a return receipt.

I. The other exhibits attached to petitioner’s affidavit (*see* Finding of Fact 9) are not relevant to the threshold jurisdictional issue of timeliness.

J. While the subject notice was mailed on October 14, 2008, the request was not filed until April 20, 2009, which is well beyond the 90-day period of limitations. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003).

K. The Division of Taxation's motion for summary determination is granted, and the petition of Raymond Azzato is dismissed.

DATED: Troy, New York
August 12, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE