

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions

of

**SALEH ALTAREB, SALEH T. MOHAMMED,
AND HASSAN N. ALTAREB**

for Revision of Determinations or for Refund of Sales
and Use Taxes under Articles 28 and 29 of the Tax Law
for the Period September 1, 2006 through November 30,
2008.

ORDER
DTA NOS. 823784, 823785
AND 823786

Petitioners, Saleh Altareb, Saleh T. Mohammed and Hassan N. Altareb, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2006 through November 30, 2008.

Petitioners, appearing by the Antonious Law Firm (Jacqueline S. Antonious, Esq., of counsel), brought a motion dated December 15, 2010, seeking summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.9(b) and (c) and CPLR 3212. Petitioners submitted a summary of the motion arguments, together with exhibits attached thereto in support of the motion. The Division of Taxation, appearing by Daniel Smirlock (Anita Luckina, Esq., of counsel), submitted an Affirmation in Opposition to the motion together with exhibits attached thereto in on January 13, 2011, which date began the 90-day period for issuance of this order. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUES

I. Whether the notices of determination issued to petitioners pursuant to Tax Law § 1138(a)(1) shall be deemed invalid and thus canceled, as a result of the Division of Taxation's failure to properly serve such notices to petitioners and their representative.

II. Whether there is an absence of material facts surrounding a determination of the responsible officer status of petitioners for tax assessed against Moal Grocery & Deli.

FINDINGS OF FACT

1. As a result of a sales tax field audit of Moal Grocery & Deli, a neighborhood deli and grocery store in New York, New York, the Division of Taxation (Division) issued the following six notices of determination:

<u>Date of Notice</u>	<u>Assessment No.</u>	<u>Notice recipient(s)</u>	<u>Address where notice was mailed</u>	<u>Period assessed</u>	<u>Tax Assessed</u>
6/1/09	L-031983030-5	Saleh T. Mohammed, Saleh N. Altareb & Hassan N. Altareb d/b/a/ Moal Grocery & Deli	748 10 th Ave., New York, NY 10019-7019	3/1/06 to 5/31/06	\$5,219.81
8/24/09	L-032427087-9	Saleh T. Mohammed, Saleh N. Altareb & Hassan N. Altareb d/b/a/ Moal Grocery & Deli	748 10 th Ave., New York, NY 10019-7019	6/1/06 to 8/31/06	\$6,278.73
11/6/09	L-032918651-4	Saleh T. Mohammed, Saleh N. Altareb & Hassan N. Altareb d/b/a/ Moal Grocery & Deli	748 10 th Ave., New York, NY 10019-7019	9/1/06 to 11/30/08	\$72,017.63
1/4/10	L-033150181-4*	Hassan Altareb	748 10 th Avenue 3S, New York, NY 10019-7019	9/1/06 to 11/30/08	\$72,017.63
1/4/10	L-033150175-9*	Saleh Altareb	738 10 th Avenue 3S, New York, NY 10019-7007	9/1/06 to 11/30/08	\$72,017.63

1/4/10	L033150178-6*	Saleh T. Mohammed	2400 E. 3 rd St., Brooklyn, NY 11223-5356	9/1/06 to 11/30/08	\$72,017.63
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*Each notice indicates that the recipient is being assessed as an officer or responsible person of “Saleh T. Mohammed, Saleh N. Altareb & Hassan N. Altareb” (d/b/a Moal Grocery & Deli).

All of the notices listed above were issued with additional assessments for penalty and interest. The notices that are the focus of this motion are those issued to the individual petitioners (L-033150181-4, L-033150175-9 and L-033150178-6).

2. Petitioners filed three requests for conciliation conference, dated June 15, 2009, August 31, 2009 and November 30, 2009, for Assessment Nos. L-031983030-5, L-032427087-9 and L-032918651-4, respectively. A conciliation conference with the Bureau of Conciliation and Mediation Services was scheduled for February 11, 2010.

3. By correspondence dated January 21, 2010, petitioners adjourned the February 2010 conference to attempt to resolve the responsible person notices (L-033150181-4, L-033150175-9 and -L033150178-6) and engage in settlement negotiations.

4. On March 24, 2010, a conciliation conference was held. BCMS issued conciliation orders dated July 16, 2010, sustaining the three notices pertaining to the business (Assessment Nos. L-031983030-5, L-032427087-9 and L-032918651-4), and recomputed the notices issued to the individual petitioners (L-033150181-4, L-033150175-9 and L-033150178-6) for the period September 1, 2006 through November 30, 2008, to \$65,006.70 each, plus interest and penalty computed at the applicable rate.

5. A petition seeking administrative review of the assessments described above, dated August 4, 2010, was received by the Division of Tax Appeals on August 9, 2010. The Division filed a timely answer dated November 3, 2010.

6. Petitioners subsequently brought this motion for summary determination seeking cancellation of the notices issued to the individual petitioners (L-033150181-4, L-033150175-9 and L-033150178-6) on the basis of improper service and mailing flaws, and summary determination in favor of petitioners on the basis that Hassan N. Altareb and Saleh T. Mohammed are not responsible officers of Moal Grocery & Deli, since there are no material and triable issues of fact concerning their status as responsible persons.

In support of its motion for summary determination, petitioners submitted: copies of the petitions filed with the Division of Tax Appeals on behalf of the individual petitioners; copies of the of the notices of determination pertaining to the individual petitioners; the corresponding answers filed by the Division in response to the petitions of the individual petitioners; the affidavits of the each of the individual petitioners; separate individual powers of attorney appointing Jacqueline Antonious, Esq., as petitioners' representative; correspondence between Ms. Antonious, on behalf of petitioners, and the Division; and the sales tax returns of Saleh Altareb d/b/a Moal Grocery & Deli for the period September 1, 2006 through November 30, 2008.

7. In opposition to the motion, the Division submitted an affirmation in opposition to petitioners' motion for summary determination, dated January 13, 2011; copies of the notices issued to the business and copies of the notices issued to each of the individual petitioners; the requests for conciliation conference dated June 15, 2009, August 31, 2009 and August 31, 2009; the conciliation orders issued that pertain to the six notices discussed herein; copies of the petitions filed with the Division of Tax Appeals; copies of the Division of Taxation's answers; copies of the first four pages of Hassan Altareb's 2008 state income tax return (form IT-201), the first four pages of Saleh Altareb's 2008 form IT-201 and the personal income tax return filing

record of Saleh T. Mohammed, obtained from the Division's Case and Resource Tracking System; the affidavits of Patricia Finn Sears concerning each of the notices issued to the individual petitioners, attached to which is the certified mail record (CMR) for January 4, 2010 and the corresponding notice appearing on that CMR; the affidavits of Bruce Peletier concerning the notices issued to the individual petitioners; copies of checks written on the Moal Grocery & Deli account; a general inspection report; and a responsible person questionnaire.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioners' motion seeks cancellation of the notices issued to the three officers as invalid, on the following grounds:

a. Petitioners maintain that the notices were not served in accordance with Tax Law § 1138(a)(1) inasmuch as they were not mailed to them at the addresses provided in the last returns filed by them.

b. Petitioners argue that the Division also failed to timely serve the notices of determination in issue on the designated representative who had been involved with these matters since the filing of the power of attorney on January 2, 2009, prior to the issuance of any of the notices in issue.

c. Petitioners and their representative did not receive the January 4, 2010 notices, and were not provided notice that such assessments had been issued by the Division until near the time of the BCMS conference.

9. Petitioners' motion for summary determination additionally seeks a determination that there are no material facts in issue with regard to the officer or responsible person status of petitioners Hassan Altareb and Saleh Mohammed.

10. The Division opposes the cancellation of the notices in issue and the motion for summary determination on the following grounds:

a. The Division argues that the notices were properly served on petitioners in accordance with Tax Law § 1138(a)(1), and mailed to petitioners' addresses as set forth on the last income tax returns filed by petitioners prior to the issuance of the notices.

b. The Division also outlines the mailing standards and procedures, and maintains such procedures have been properly followed, in order to provide petitioners with proper notice.

c. In the alternative, the Division asserts that even if it is determined that the notices were improperly mailed to petitioners, the focus should be on whether petitioners received the notices in time to protest them. The Division concludes that at the very least there are material and triable issues of fact as to the proper service of the notices and the motion should be denied on this point.

d. The Division maintains that, concerning the responsible person status of Hassan Atareb and Saleh Mohammed, there are material and triable issues of fact that require the motion for summary determination on this issue to be denied.

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 filed 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, 852, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [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 if 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 [1989]). 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 [1960]). “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, 449, 582 NYS2d 170, 173 [1992], citing *Zuckerman v. City of New York*).

C. The first portion of petitioners’ motion urges a finding that the notices in issue are invalid due to a series of flaws concerning the mailing of the notices. In case law addressing the issue of misaddressed mail, the focus is whether, notwithstanding an erroneous address, there was actual receipt of the notice. In *Matter of Agosto v. Tax Commission of the State of New York* (68 NY2d 891, 508 NYS2d 934 [1986]), where the notice was addressed to 294 Wallen Street instead of the correct 294 Warren Street, and in *Matter of Rosen* (Tax Appeals Tribunal, July 19, 1990), where the notice was addressed to 6 Bluewater Hill South instead of the correct 9 Bluewater Hill South, there was evidence that the notices, albeit misaddressed, were in fact

actually received by the intended taxpayer addressees. The Court and the Tribunal, respectively, held in these cases that actual receipt of the notices was sufficient to overcome the use of an erroneous address. In *Agosto*, the Court held that where a “minor error” occurred in the address to which the notice of deficiency was sent and where the Division “determined that there was actual receipt in sufficient time to file a petition for redetermination of the deficiencies,” the deficiencies would stand. Similarly, in *Matter of Riehm v. Tax Appeals Tribunal* (179 AD2d 970, 579 NYS2d 228 [1992], *lv denied* 79 NY2d 759, 584 NYS2d 447 [1992]), the notice was mailed to the taxpayer’s former address, but was nonetheless received by the taxpayer in time to file a protest. The Court held, consistent with *Agosto*, that under such circumstances the actual receipt of the notice in sufficient time to file a petition leaves the notice valid and overcomes the fact of an error in the address. The same principle applies here, and it is concluded that the notices were valid.

D. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer’s representative is not served with the statutory notice (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29 [1977]). In this matter, petitioner raises as error, the Division’s failure to mail the notice in issue to petitioners’ former representatives.

Flaws in providing petitioners and their representative with proper notice may inhibit or completely prevent the due process required in this system of administrative review. In cases where there is no admission or evidence of delivery of the notices to petitioners in time to

protest, an analysis of whether the errors were consequential must be made (*see Matter of Combermale*, Tax Appeals Tribunal, March 31, 1994). However, here, even before a determination is made as to whether the notices were improperly addressed, or whether service to petitioners' representative was inappropriately absent, it is critical to note that petitioners and Ms. Antonious, by their own admission, actually received the notices in time to protest. Further, they were granted a conciliation conference by BCMS and afforded ample additional time to resolve the issues in dispute, and took advantage of such time provided to them. Accordingly, petitioners experienced no prejudice, and the notices in issue are not invalidated by the possible presence of any flaws or missteps in delivery.

E. Petitioners' second portion of the motion for summary determination seeks a determination that there are no material issues of fact concerning the responsible person status of Hassan Altareb and Saleh Mohammed in relation to Moal Grocery & Deli, and thus suggests a conclusion that they cannot be held personally liable for the sales taxes due from the business.

Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, any employee of an individual proprietorship who, in their capacity is under a duty to act for such individual proprietorship in complying with the requirements of Article 28 (Tax Law § 1131[1]). Whether a person is an employee liable for tax must be determined upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988).

Factors to be considered, as set forth in the body of case law concerning various types of persons required to collect tax (corporate officers, directors or employees, limited liability company employees or managers, partnership employees) include the person's day to day responsibilities and functions, involvement with the financial affairs of the business, ability to hire and fire personnel, and the authorization to sign tax returns and checks (*see Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991 citing *Matter of Cohen v. State Tax Commn.*; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of Chevlowe v. Koerner*, 95 Misc 2d 388 407 NYS2d 427 [1978]). Petitioners own discussion of responsible person liability sets forth the principle that a finding that petitioners were responsible employees of the deli is clearly dependent upon the particular facts of this case, consistent with the governing statutes and case law. Since such facts are material and triable issues of fact, which must be established by petitioners, summary determination is not an appropriate means to resolve this matter.

F. Petitioners' motion for summary determination is denied, and this matter will be scheduled for a hearing in due course.

DATED: Troy, New York
March 31, 2011

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE