

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROSALIND SANCHEZ : ORDER
 : DTA NO. 823870
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods September 1, 2006 through November 30, 2008 :
and December 1, 2008 through May 31, 2009. :
:

Petitioner, Rosalind Sanchez, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 2006 through November 30, 2008 and December 1, 2008 through May 31, 2009. The petition protested assessment numbers L-032515103 and L-032481911.

On November 19, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 31, 2011, Administrative Law Judge Timothy Alston issued an order dismissing the petition with respect to assessment number L-032515103 and withdrawing the Notice of Intent with respect to assessment number L-032481911.

On July 13, 2011, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, Esq., dated July 13, 2011, and annexed exhibits supporting the motion. Petitioner, appearing by Leonard L. Fein, CPA, filed a

brief dated August 8, 2011, along with an attached exhibit, in response to the Division's motion. The Division filed a letter dated August 16, 2011 in reply to petitioner's August 8, 2011 response.¹ Accordingly, the 90-day period for issuance of this order commenced on August 16, 2011.

After due consideration of the entire record in this matter, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

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 September 8, 2009 and addressed to petitioner, Rosalind Sanchez, at a Jersey City, New Jersey, address. The notice, assigned assessment identification number L-032481911, asserts additional sales and use tax due of \$42,161.27, plus penalty and interest, for the period September 1, 2006 through November 30, 2008. The notice indicates that petitioner was subject to assessment as a responsible officer of M & J Liquor Corp.

2. On September 20, 2010, petitioner protested the subject Notice of Determination by filing a petition, dated September 17, 2010, with the Division of Tax Appeals.²

¹ The Division's reply to petitioner's response to the motion is allowed by permission of the administrative law judge (*see* 20 NYCRR 3000.5[b]). Additionally, it is noted that petitioner filed a letter dated August 22, 2011 with an attached exhibit in reply to the Division's August 16, 2011 reply. As the Rules of Practice and Procedure make no provision for the filing of such a sur-reply in connection with Division of Tax Appeals motion practice (*see* 20 NYCRR 3000.5), petitioner's August 22, 2011 filing has not been considered herein. In any event, it appears that petitioner failed to properly serve the Division of Taxation with a copy of the sur-reply. Consideration of the sur-reply is also properly denied on that basis (*see* 20 NYCRR 3000.5[b]).

² Petitioner did not file a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services with respect to the subject notice.

3. In support of the present motion, the Division submitted the following: (i) an affidavit, dated July 6, 2011, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 8, 2009; (iii) an affidavit, dated July 7, 2011, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated July 7, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such requests dated April 8, 2011; and (vi) a copy of petitioner's undated 2008 New York nonresident income tax return, the last return petitioner filed with the Division before the issuance of the subject Notice of Determination. Petitioner's address as reported on this return is the same as that listed on the subject Notice of Determination.

4. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the 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 of the CMR in the present case to the actual mailing date of "9/8/09." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by

Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. All notices are assigned a certified control number. The certified control 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 CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

6. The CMR relevant to the present matter consists of 34 pages and lists 372 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated September 8, 2009 to each page of the CMR and also wrote his or her initials on each page thereof.

7. Page 1 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 1512 1499 and assessment number L-032481911, was mailed to petitioner at the Jersey City, New Jersey, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

8. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets

and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contains such postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS did not comply with this request.

9. According to both the Maney and Peltier affidavits, a copy of the subject Notice of Determination was mailed to petitioner on September 8, 2009, as claimed.

10. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 1512 1499 and addressed to petitioner. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1512 1499 and addressed to petitioner was delivered as addressed in Jersey City, New Jersey, on September 12, 2009.

11. The Division did not issue a copy of the subject Notice of Determination to any representative of petitioner.

12. In opposition to the Division's motion, petitioner offered a Power of Attorney (Form POA-1) that lists "M & J Liquors Corp./ Rosalind Sanchez" as taxpayers and appoints Leonard Fein, CPA, to represent such taxpayers in connection with two assessment numbers, one of

which is L-032481911 (that is, the assessment or notice number at issue herein). The form further identifies the tax matters to which it applies as “sales tax” for the period “6/1/2006-5/31/2009.” The power of attorney has been signed by petitioner and dated June 29, 2009. Petitioner’s signature has been acknowledged by a notary public in the corporate acknowledgment section of the form and such acknowledgment is dated June 29, 2009. Mr. Fein has signed the form agreeing to be the representative as indicated and his signature is dated June 30, 2009. The taxpayer address listed on the power of attorney form is that of M & J Liquors Corp. Additionally, the corporation’s EIN is listed under the heading “Taxpayer’s EIN or SS number.” Next to petitioner’s signature on the form, under the heading “Title, if applicable,” petitioner wrote “president.” The form also provides Mr. Fein’s address and phone number.

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 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]). 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, 441, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Vil. 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’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1992] citing *Zuckerman*).

C. There is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a Notice of Determination (Tax Law § 1138[a][1]). In most cases, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 1138[a][1]). In the present matter, however, the Division does not seek to establish the date of issuance of the statutory notice, but rather the date of receipt of the notice by the taxpayer. Under such circumstances, that is, where the date of mailing is not established, the 90-day period for filing a petition or request for conciliation conference commences with the date of actual notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

D. Here, the record shows that petitioner received actual notice of the subject Notice of Determination on September 12, 2009. Specifically, the Maney and Peltier affidavits establish the Division’s standard mailing procedure, including the assigning of a certified control number

to each notice, the listing of such certified control numbers on the mailing cover sheet as well as the CMR, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheet related to the notice mailed to petitioner confirms that the control number listed thereon is consistent with the control number listed on the CMR and the USPS response to the Division's request for delivery information. The documentation provided to the Division by the USPS shows that an article of mail bearing such certified control number was delivered to petitioner's address on September 12, 2009. Petitioner thus received actual notice of the subject Notice of Determination on that date.

E. Petitioner's petition was filed on September 20, 2010, well-beyond the 90 days from the date of actual notice. It is well established, however, that the 90-day period for filing a petition or a request for conciliation conference is tolled if the taxpayer's representative is not served with a copy of the statutory notice (*see Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Accordingly, petitioner points to the power of attorney form, dated June 29, 2009, appointing Mr. Fein as her representative (*see* Finding of Fact 12) and asserts that the Division's failure to mail a copy of the notice to Mr. Fein (*see* Finding of Fact 11) tolled the 90-day period. Consequently, petitioner asserts, her petition in this matter, filed on September 20, 2010, must be deemed timely.

To the contrary, the Division asserts that said power of attorney is "only effective for the corporation." In support of this assertion, the Division notes that the form lists the corporation's address, the corporation's Federal EIN, and the entry of "president" under the "title" heading (*see* Finding of Fact 12). The Division raises no other objections to the power of attorney.

The power of attorney in question lists two distinct taxpayers, petitioner and the corporation of which petitioner was president. It is signed by petitioner and authorizes Mr.

Fein's representation with respect to two assessment numbers, one of which corresponds to the notice issued to petitioner. The form further accurately describes the tax matters to which it relates as "sales tax" and lists a period that is consistent with the subject Notice of Determination. The power of attorney is thus sufficiently specific to put the Division of Taxation on notice that petitioner had appointed Mr. Fein as her representative with respect to the assessment number at issue (*see Matter of Top Shelf Deli*, Tax Appeals Tribunal, February 6, 1992). This clear intent to appoint Mr. Fein as petitioner's representative in connection with her individual liability is not negated by the use of the corporate address, the corporate EIN or the use of the title "president." Accordingly, the 90-day limitations period was tolled and the petition was thus timely filed with respect to assessment number L-032481911.

F. The Division of Taxation's motion for summary determination is denied. Moreover, the issue of the timeliness of petitioner's petition having been resolved by this order, this matter shall be scheduled for a hearing, in due course, on petitioner's protest of assessment number L-032481911.³

DATED: Troy, New York
November 3, 2011

/s/ Timothy Alston

ADMINISTRATIVE LAW JUDGE

³ As noted previously, petitioner's protest of assessment number L-032515103, also part of her petition, was dismissed pursuant to the Order of the administrative law judge dated March 31, 2011.