

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NICHOLAS J. BRUZZESE	:	ORDER
		DTA NO. 824171
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 September 1, 2005 through August 31, 2008.	:	

Petitioner, Nicholas J. Bruzzese, 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 September 1, 2005 through August 31, 2008.

On March 1, 2011, 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 28, 2011, petitioner, appearing by David I. Barrett, Esq., and John Tapinis, EA, submitted documents in opposition to dismissal. On April 25, 2011, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this Order commenced April 25, 2011. After due consideration of the documents submitted,¹ Timothy Alston, Administrative Law Judge, renders the following order.

¹ At the request of the Division of Tax Appeals, Mr. Barrett submitted a corrected power of attorney on May 31, 2011. At that time, Mr. Barrett also submitted documents challenging the merits of the underlying assessment against petitioner. As such documents were submitted well beyond the 30-day period provided under the Rules of Practice and Procedure (*see* 20 NYCRR 3000.9[a][4]), and considering that petitioner did not request additional time to make such a filing, and also considering their lack of relevance to the jurisdictional issue at hand, such documents have not been considered in rendering this order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. On February 9, 2011, petitioner, Nicholas J. Bruzzese, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a Conciliation Default Order, dated October 29, 2010 and bearing CMS number 237574,² issued to him by the Bureau of Conciliation and Mediation Services (BCMS).

2. On March 1, 2011, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant conciliation order was issued on October 29, 2010, but that the petition was not filed until February 9, 2011, or 103 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U. S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

4. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of

² The Conciliation Default Order indicates that a conciliation conference was scheduled on October 12, 2010; that notice of such conference was mailed on September 3, 2010; and that the requester (i.e., petitioner) failed to appear at the scheduled conference.

mailing, to the conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

5. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's (Division) Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

6. The AFP Unit also produces a computer-generated certified mail record (CMR). The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

7. The clerk, as part of his or her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

8. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and, on each page of the CMR, also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

9. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “10/29/10” is written in the upper right corner of each page of the CMR

10. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up, in BCMS, by an employee of the Division’s Mail Processing Center.

11. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on October 29, 2010. This CMR lists 59 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

12. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0247 5147 is reference/CMS number 000237574, along with petitioner’s name and a Staten Island, New York, address that is identical to petitioner’s address as listed on the petition filed in this matter.

13. The Division also submitted the affidavit of James Steven VanDerZee, Head Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the

information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

14. In this particular instance, the postal employee affixed a postmark dated October 29, 2010 to each page of the six-page CMR. The postal employee also wrote his or her initials on page six. The postal employee did not handwrite the total number of pieces received as requested (*see* Finding of Fact 8).

15. Mr. VanDerZee states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. VanDerZee's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

16. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on October 29, 2010, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at a Staten Island, New York, address to a branch of the USPS in Albany, New York, in a sealed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on October 29, 2010 for the records of BCMS. Mr. VanDerZee asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the item of certified mail to petitioner on October 29, 2010.

17. The Division also submitted the affidavit 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, a Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request. The Corina affidavit describes the Division's request to the Postal Service for delivery information on the subject conciliation order. Specifically, using PS Form 3811-A the Division requested delivery information with respect to an article of mail bearing certified control number 7104 1002 9730 0247 5147. The USPS response to this request indicates that the article bearing such certified control number and addressed to petitioner was returned to the Division on December 6, 2010. A copy of the envelope indicates that this article of mail was unclaimed by the addressee.

18. A BCMS clerk's handwritten note next to petitioner's name on page two of the CMR indicates that the subject Conciliation Default Order was returned to BCMS as unclaimed, that the address was then verified and the order was subsequently remailed. Mr. Farrelly's affidavit indicates that the order was remailed to petitioner by regular USPS mail on December 15, 2010, in accordance with BCMS policy.

19. Information obtained by the Division from USPS through the "Track & Confirm" function of the USPS website indicates that delivery of the article of mail bearing the above-noted certified control number was attempted on November 1, 2010.

20. Petitioner responded to the Notice of Intent to Dismiss by letter of John Tapinis, EA, dated March 28, 2011, stating that petitioner first received notice of the subject Conciliation Default Order by regular USPS mail on December 22, 2010. Along with the letter petitioner enclosed a copy of the envelope in which the order was mailed. That envelope has a metered mail stamp dated December 20, 2010. Petitioner notes that the petition was filed within 90 days

of the December 20, 2010 date on the envelope. He further noted that it was never his intention to ignore the Conciliation Default Order.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). A conciliation order is thus binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination.

C. As provided in section 3000.9(b)(1) of the Rules, 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. . . .”

D. 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*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact

and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). That is, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. Here, the Farrelly and VanDerZee affidavits and the CMR establish the Division's standard mailing procedure. As to whether such procedure was followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, the CMR, although otherwise properly prepared, is flawed because the postal employee did not handwrite the total number of pieces received as requested (*see Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998). Such a flaw may be overcome by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008) and such evidence is present in this matter. Specifically, the USPS "Track & Confirm" information shows that delivery of the order was attempted on November 1, 2010 and the USPS delivery information in response to the Division's form 3811-A request shows that the conciliation order addressed to petitioner was returned to the Division as unclaimed on December 6, 2010. This other evidence of mailing is sufficient to overcome the flaw in the CMR and, along with the CMR, establishes the fact of mailing of the subject conciliation order as claimed on October 29, 2010. Additionally, it is noted that petitioner does

not assert any error in the address to which the Conciliation Default Order was mailed. Indeed, petitioner listed the identical address on his petition.

G. Where, as here, a conciliation order has been properly mailed, Tax Law § 170(3-a)(e) does not require actual receipt of the order by the taxpayer. Specifically, section 170(3-a)(e) provides that a conciliation order is binding unless a petition is filed “within ninety days after the conciliation order is *issued* (emphasis added).” Issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The statutory reference to the issuance (or mailing) of the order as the trigger for the 90-day limitations period is similar to the language of Tax Law § 681(b), which provides that “after ninety days from the *mailing* of a notice of deficiency, such notice shall be an assessment . . . [unless] the taxpayer has, within such ninety day period filed . . . a petition [with the Division of Tax Appeals] [emphasis added].” Pursuant to this language, it is well established that receipt is not a part of the service requirement for a notice of deficiency (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Given this similarity of language, Tax Law § 170(3-a)(e) is properly interpreted similarly to Tax Law § 681(b). Hence, notwithstanding that the subject conciliation order was returned to the Division as unclaimed, the 90-day limitations period for the filing of a petition in this matter commenced as of the date of mailing, October 29, 2010. The petition in this matter, having been filed beyond the 90-day period, was therefore untimely.³

H. Under the instant circumstances, even if receipt was a factor in the procedural equation, that is, that proper mailing were to give rise to a presumption of receipt (*see Matter of Sugranes*,

³ The language in Tax Law § 170(3-a)(e) and Tax Law § 681(b) contrasts with the former notice provisions under Article 28. Specifically, Tax Law former § 1138[a][1] provided for the “giving” of notices of determination in sales tax rather than, as noted above, the issuance or mailing of notices or orders. This language, together with that of Tax Law § 1147(a)(1), made “‘receipt’ part of the procedural equation” in sales tax (*see Matter of Ruggerite v. State Tax Commn.*, 64 NY2d 688, 690, 485 NYS2d 517, 518 [1984]).

Tax Appeals Tribunal, October 3, 2002), the return of the order to BCMS as unclaimed would not rebut the presumption. Specifically, there is no indication in the record that the USPS did not follow appropriate procedures (*cf. Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945 [3d Dept 1983], *affd* 64 NY2d 688 [1984]). Furthermore, considering that petitioner continued to use the address on the Conciliation Default Order (*see* Finding of Fact 12), it is reasonable, absent any evidence to the contrary, to equate petitioner's unclaimed order with a refusal to accept delivery and thus deem the order as constructively received (*see Matter of American Cars "R" Us, Inc. v. Chu*, 147 AD2d 797, 537 NYS2d 672 [1989]).

I. That petitioner may have filed his petition within 90 days of mailing of the copy of the subject order by regular USPS mail in December 2010 does not render his protest timely (*see* Finding of Fact 20). As discussed above, the date of issuance of the Conciliation Default Order was October 29, 2010. Pursuant to Tax Law § 170(3-a)(e), the 90-day period in which to file a petition commenced on that date and not the later date, which followed the return of the unclaimed certified mail to BCMS.

J. The petition of Nicholas J. Bruzzese is hereby dismissed.

DATED: Troy, New York
June 16, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE