

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HENDRICKSON TOWING, INC. : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 825279
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2007 through February 28, 2010. :

Petitioner, Hendrickson Towing, Inc., 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, 2007 through February 28, 2010.

On November 29, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were subsequently granted an extension, until February 14, 2013, to respond to said Notice. On February 6, 2013, the Division of Taxation, appearing by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel) submitted documents in support of dismissal. On February 14, 2013, petitioner, Hendrickson Towing, Inc., appearing by Stephen P. Silberling, Esq., submitted documents in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on February 14, 2013. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed its petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On October 9, 2012, petitioner, Hendrickson Towing, Inc., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review assessment number L-037908671. Petitioner attached to its petition a copy of a Notice and Demand dated September 10, 2013, bearing assessment number L-037908671, and addressed to petitioner at a Kings Park, New York, address.

2. Assessment number L-037908671 relates to a Notice of Determination dated May 25, 2012 and addressed to petitioner at the same Kings Park, New York, address.

3. On November 29, 2012, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a Notice of Determination issued to petitioner on May 25, 2012 and that the petition was not filed until October 9, 2012, or 137 days later.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated February 1, 2013, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center; (ii) an affidavit, dated January 9, 2013, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 25, 2012; and (iv) a copy of the cover page of the audit report related to the subject Notice of Determination that shows the same Kings Park, New York, address for petitioner as that listed on said notice.

5. The petition filed in this matter reports the same Kings Park, New York, address for petitioner as that indicated on the subject Notice of Determination.

6. The affidavit of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units since January 2010, 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. The CMR is produced (or run) approximately 10 days in advance of the anticipated date of mailing and the date (and time) of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "5/25/12." 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 U.S. Postal Service (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.

7. 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 "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."

8. The CMR relevant to the Notice of Determination under protest consists of 28 pages and lists 302 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR relevant to this matter have been redacted to preserve the confidentiality of information relating to taxpayers and representatives who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated May 25, 2012 to each page of the CMR and also wrote his or her initials on each page thereof.

9. Page 17 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1114 5987 and assessment number L-037908671, was mailed to petitioner at the Kings Park, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. Page 19 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1114 6199 and assessment number L-037908671, was mailed to petitioner's representative, Mr. Silberling, at a Hauppauge, New York, address. The corresponding mailing cover sheet bears this certified control number and Mr. Silberling's name and address as noted.

11. The Hauppauge, New York, address for Mr. Silberling on the mailing cover sheet and the CMR is the same as that listed for Mr. Silberling on the petition herein and Mr. Silberling's correspondence with the auditor (*see* Findings of Fact 18 and 19).

12. The affidavit of Bruce Peltier, Principal 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. The 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 or initials 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 employee complied with this request by both writing and circling the number “302” on the last page next to his or her initials and the postmark.

13. Mr. Peltier has been a supervisor in the Registry Unit of the New York State Department of Taxation and Finance since March 1999. He is “currently a Principal Mail and Supply Supervisor, and accordingly . . . [he is] fully familiar with the operations and procedures of the Mail Processing Center.” His regular duties as a Principal Mail and Supply supervisor in the Registry Unit “include the supervision of Mail Processing Center staff including the staff that delivers outgoing mail to branch offices of the United States Post Office.”

14. According to both the Maney and Peltier affidavits, a copy of the subject Notice of Determination was mailed to petitioner and its representative on May 25, 2012, as claimed.

15. The petition herein alleges, in part: “I never received a notice of determination. I repeatedly protested the proposed assessment.”

16. In response to the Notice of Intent to Dismiss, petitioner submitted the affirmation of its representative stating that he, Mr. Silberling, “never received the Notice of Determination in this case.”

17. Petitioner also submitted an affidavit, dated February 14, 2013, of Vincenzo Buffalino, petitioner's president, stating, in part: "I have not received, nor has the taxpayer received, a Notice of Determination from NYS Tax."

18. Mr. Silberling transmitted a letter dated September 12, 2012 to the auditor, also submitted in response to the notice of intent herein, that stated:

I just received a Notice and Demand for the taxpayer. This is incorrect. I never received a Notice of Determination that gave me appeal rights. I therefore insist that you withdraw this case from compliance and issue a Notice of Determination.

19. Petitioner also submitted a letter dated May 18, 2012 from Mr. Silberling to Jennifer Genovese, the Division's auditor in its audit of petitioner. In this letter, Mr. Silberling stated his disagreement with the Division's proposed audit adjustments.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138[a][1]). The deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996 [petition filed *one* day late dismissed]). 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 notice of determination thus becomes an assessment subject to collection unless the taxpayer files a timely petition with the Division of Tax Appeals (Tax Law § 1138[a][1]). 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. “The standard for reviewing a Notice of Intent To Dismiss Petition is the same as reviewing a motion for summary determination” (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

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. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*).

G. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner and petitioner’s representative on May 25, 2012. Specifically, this document lists certified control numbers with corresponding names and addresses and bears USPS postmarks on each page, dated May 25, 2012. Additionally, a postal employee wrote and circled “302” on the last page of the CMR next to his or her initials to indicate receipt by the post office of all pieces of mail listed

thereon. The CMR has thus been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. The Division has thus established proper mailing of the subject Notice of Determination (*see Matter of Accardo*). Accordingly, “a presumption arises that the notice was delivered or offered for delivery . . . in the normal course of the mail” (*Matter of Katz, Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). While petitioner has the right to rebut this presumption, such rebuttal must consist of more than simply the denial of receipt (*see Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011). Petitioner presented an affidavit of its president, an affirmation of its representative and a letter from its representative to the auditor, all denying receipt of the statutory notice. Such denials are not sufficient to rebut the presumption (*see Matter of T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97 [3d Dept. 1986], *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011).

I. It is noted that the May 18, 2012 letter expressing disagreement with the proposed audit adjustments predates the subject May 25, 2012 Notice of Determination. As petitioner’s right to file a petition in protest of a sales tax deficiency with the Division of Tax Appeals arises only upon issuance of a Notice of Determination (*see Tax Law § 1138[a][1]*), the May 18, 2012 letter may not be considered a petition of the subject Notice of Determination.

J. Pursuant to the foregoing discussion, there are no material issues of fact present in this matter and dismissal of the petition is required. Specifically, the record establishes that the subject Notice of Determination was issued on May 25, 2012, and that the petition was filed on October 9, 2012, a date beyond the 90-day period of limitations. The petition was thus untimely

filed and, accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

K. The petition of Hendrickson Towing, Inc. is hereby dismissed.

DATED: Albany, New York
April 25, 2013

/s/ Timothy Alston

ADMINISTRATIVE LAW JUDGE