

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ROBERT SANTORA : DECISION
DTA NO. 827096
for Revision of a Determination or for Refund of :
Cigarette Tax under Article 20 of the Tax Law.

Petitioner, Robert Santora, filed an exception to the determination of the Administrative Law Judge issued on January 14, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on June 22, 2016, the date that the Tribunal received responses regarding petitioner's submission of additional evidence with his reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. On July 23, 2015, the Division of Tax Appeals received a petition from petitioner, Robert Santora, which protests a notice of determination issued to him. The envelope containing the petition bears a United States Postal Service (USPS) postmark of July 21, 2015. The notice issued to petitioner is dated April 10, 2015 and states that a penalty of \$19,560.00 is imposed because, on August 20, 2014, he was found to be in possession of “unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

2. On August 7, 2015, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a notice of intent to dismiss petition. The notice indicates that the notice of determination was issued on April 10, 2015, but that the petition was not filed until July 21, 2015, or 102 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: (i) an affidavit of Mary Hurteau, an attorney employed in the Office of Counsel of the Division, dated October 19, 2015; (ii) an affidavit, dated October 14, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Non-Presort Manual Mail - Assessments Receivable” (CMR) postmarked April 10, 2015; and (iv) an affidavit, dated October 19, 2015, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division’s mail room.

4. In order to prove that the notice of determination was sent to petitioner’s last known address, the Division submitted a copy of petitioner’s e-filed IT-201 for the year 2014, which was the last document filed with the Division by petitioner prior to the issuance of the notice of determination. The address on said form matches the address contained on the notice of determination and that listed by petitioner on the petition filed in this matter.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. The CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. In the upper right corner of the CMR, the date the notice was mailed was handwritten by an individual in the Division's Mail Processing Center in order to conform with the CMR and the date that the CMR and the notice are delivered to the Postal Service.

6. 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 taxpayer's 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 PO Address."

7. The April 10, 2015 CMR consists of one page and lists one certified control number along with the corresponding assessment number, name and address. A USPS employee affixed a USPS postmark dated April 10, 2015 to the CMR and also wrote his or her initials on the CMR. The CMR indicates that the notice of determination, assigned certified control number 7104 1002 9730 0446 2909 and assessment number L-042695024, was mailed to petitioner at the

Franklin Square, New York, 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 supervisor in the mail room since 1999 and currently a mail and supply clerk, describes the mail room's general operations and procedures. The mail room 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. A clerk performs a review of the pieces listed on the CMR by checking those envelopes against the information contained on 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 initials or signature on the CMR, indicating receipt by the post office. 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 CMR. Here, the USPS employee initialed the CMR, affixed a postmark and wrote the number "1," indicating that one piece of mail was delivered to the USPS.

9. According to the Peltier affidavit, the subject notice was mailed to petitioner on April 10, 2015, as claimed.

10. In response to the notice of intent to dismiss petition, petitioner's representative, Mr. Nektalov, submitted a letter that acknowledges that the petition was filed late, but requests that the late filing be overlooked in the interest of justice and because there is no prejudice to the State of New York. Petitioner asks that he be afforded his day in court.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions following the issuance of a notice of determination. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice of determination by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that this procedure was followed in this specific case.

The Administrative Law Judge found that the Division had met its burden of establishing the date and fact of mailing of the subject notice of determination to petitioner's last known address on April 10, 2015. Specifically, the Administrative Law Judge found that the CMR in this matter was properly completed and constituted probative evidence of the date and fact of mailing. Accordingly, the Administrative Law Judge concluded that the CMR, along with the Nagengast and Peltier affidavits, established that the Division had a general mailing procedure and that such procedure was followed in this instance. As the subject petition was filed on July 21, 2015, which was beyond the statutory 90-day period in which to file a petition, the Administrative Law Judge held that the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner acknowledges that the petition was filed late, but requests that such late filing be overlooked so that he may be afforded his date in court. Petitioner makes a substantive argument that the notice at issue is unfair. Additionally, petitioner offered documents with his reply brief that were not included in the record before the Administrative Law Judge.

The Division relies upon the determination of the Administrative Law Judge and the papers submitted by the Division with its motion.

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for such a notice is the same as that for a summary determination motion (***Matter of Victory Bagel Time***, Tax Appeals Tribunal, September 13, 2012).

Our rules provide that a summary determination motion "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" (20 NYCRR 3000.9 [b] [1]).

As we previously noted in ***Matter of United Water New York***:

"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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see Gerard v. Inglese***, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (***Daliendo v. Johnson***, 147 AD2d 312 [1989])" (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004).

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the

custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We agree with the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

We also find that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). Specifically, this document lists the certified control number and reference number with petitioner's name and address and bears a USPS postmark dated April 10, 2015 on the page. There is one piece of mail listed on the CMR and a postal employee initialed the CMR to indicate receipt by the post office of one piece of mail listed thereon in accordance with the Division's standard mailing procedure. We thus conclude that the Division has presented sufficient documentary proof to establish that the notice of determination was mailed as addressed to petitioner on April 10, 2015.

A petition must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8,

2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). As the petition herein was not filed until July 21, 2015, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

As noted, petitioner submitted documents with his reply brief on exception. Such documents were not included in the record before the Administrative Law Judge. Our position on the submission of evidence on exception may be summarized as follows:

“We have held that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]’ (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation and Fin.*, 116 AD3d 1176 [2014]). Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991)” (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014).

We thus do not accept into the record herein the documents submitted for the first time on exception and have not considered such documents in the rendering of this decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Santora is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Robert Santora is dismissed, with prejudice.

DATED: Albany, New York
November 23, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner