

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AHMED NAGI AHMED	:	DECISION
	:	DTA NO. 827381
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, 2010 through	:	
May 31, 2012.	:	

Petitioner Ahmed Nagi Ahmed filed an exception to the determination of the Administrative Law Judge issued on July 21, 2016. Petitioner appeared by The Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioner filed a brief in support of his petition. The Division filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York, on January 12, 2017, which date began the six-month period for the issuance of this decision.

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

ISSUE

Whether the Division of Tax Appeals properly dismissed petitioner's protest of the notice of determination as untimely.

FINDINGS OF FACT

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

1. Uncle Grocery, Deli & 99C Plus Corp. (Uncle Grocery), is a New York corporation doing business as a grocery store and deli on Dorchester Road in Brooklyn, New York.

2. At all relevant times, petitioner, Ahmed Nagi Ahmed, was Uncle Grocery's president and sole shareholder.

3. In January 2011, petitioner moved to Lumberton, North Carolina. That same year, he hired Amer Ahmed as an employee to manage Uncle Grocery. In his affidavit submitted as part of this proceeding, petitioner described Amer's role:

“[Amer] was responsible for the daily management operations of the business, including, collecting sales tax and filing sales tax returns. . . . He was neither a shareholder nor an officer of the business, only an employee. I never gave him authority to enter into contracts on behalf of the business or to execute consents to any tax due.”

4. In 2013, the Division of Taxation (Division) performed a sales and use tax audit of Uncle Grocery. On August 15, 2013, at the conclusion of the audit, the Division issued a statement of proposed audit change to Uncle Grocery, asserting additional sales and use tax of \$52,659.14 and interest of \$11,099.59 for the period September 1, 2009 through May 31, 2012. The statement included a proposed consent that called for agreement to the assessed amounts of tax and interest, waiver of any rights to the issuance of a notice of determination or a hearing, and that any future challenge to its findings would require prepayment and a timely refund claim. The consent was signed by an “owner, partner, or corporate officer or authorized representative” of Uncle Grocery on September 14, 2013, but the signatory and his handwritten entry for title are

unclear. The Division maintains that the consent was signed by petitioner, while he maintains that it was signed by his employee, Amer Ahmed, without proper authority.

5. On November 22, 2013, the Division issued to Uncle Grocery a notice and demand for payment of tax due number L-040435803 (notice and demand) in the amount of \$52,659.14 in sales and use tax and \$11,983.35 in interest for the period September 1, 2009 through May 31, 2012. The notice and demand was predicated on the consent that was signed on September 14, 2013 by either petitioner or Amer Ahmed on behalf of Uncle Grocery.

6. On November 27, 2013, the Division issued notice of determination number L-040454828 (notice of determination) to petitioner as a responsible person of Uncle Grocery pursuant to Tax Law § 1133. The notice of determination assessed sales and use tax of \$33,348.57 and interest of \$5,995.67 for the period September 1, 2010 and May 31, 2012.¹ The notice of determination was addressed to petitioner at “4624 Avenue D, Brooklyn, New York 11203-5816.”

7. Petitioner electronically filed his 2011 New York State resident income tax return on or about February 20, 2012. On his 2011 return, petitioner listed his address as 4624 Avenue D, Brooklyn, New York 11203. The record lacks evidence of the filing of any subsequent New York returns by petitioner. It also lacks evidence of any notification by petitioner to the Division of a change in address between February 2012 and November 27, 2013.

8. On December 15, 2015, Uncle Grocery filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice and demand.

¹ Neither party explained why the period covered in petitioner’s notice of determination, unlike that of Uncle Grocery, did not include September 1, 2009 through August 31, 2010.

9. On February 26, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to Uncle Grocery a notice of intent to dismiss petition. The notice of intent indicates that pursuant to Tax Law § 173-a, the Division of Tax Appeals lacks jurisdiction to hear the merits of a petition that is filed in protest of a notice and demand. Additionally, Judge Ranalli noted that Uncle Grocery executed a consent, thereby waiving its rights to a hearing.

10. Additionally, on December 15, 2015, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice of determination.

11. In his petition challenging his responsible person assessment, petitioner asserted that after he moved to North Carolina in January 2011, “he was not ‘a person required to collect tax’ for the business from that date forward,” and “he no longer managed the day-to-day operation of the business, collected business income, made business deposits, or signed tax returns.”

12. On February 26, 2016, Judge Ranalli issued to petitioner a notice of intent to dismiss petition. The notice of intent indicates that all proceedings before the Division of Tax Appeals must be commenced by the timely filing of a petition in protest of a statutory notice, which, here, is 90 days after issuance of the notice. In this case, Judge Ranalli noted that the statutory notice was issued on November 27, 2013, but that the petition was filed on December 15, 2015, or 748 days later. As a result, the Division of Tax Appeals is without jurisdiction to hear the merits of petitioner’s petition.

13. Petitioner submitted a packet of materials in response to the issuance of the notice of intent to dismiss petition. The documents submitted were: i) the affidavit of petitioner; ii) a printout of the New York State Department of State’s entity information from its Division of Corporations; iii) a copy of petitioner’s North Carolina driver’s license issued on March 2, 2011;

iv) a copy of a North Carolina certificate of title for a motor vehicle dated March 18, 2011; v) the relevant statutory notices; and vi) a responsible person questionnaire completed by Amer Ahmed and signed on August 28, 2015.

14. In his affidavit, petitioner asserts that he was Uncle Grocery's president and sole shareholder since its 2005 incorporation. He states that in January 2011, he moved to Lumberton, North Carolina, and that he "has regularly been filing" all of his state income tax returns with that address.² As noted in finding of fact 3, petitioner adds that he hired Amer Ahmed to perform the daily management of Uncle Grocery, including collecting sales tax and filing returns. Petitioner states, however, that he did not authorize Amer Ahmed to execute the consent on behalf of Uncle Grocery. Finally, petitioner avers that he was "never mailed" a copy of the notice of determination.

15. In response to the issuance of the notice of intent to dismiss petition to Uncle Grocery, the Division submitted a copy of the signed consent.

16. Meanwhile, in response to the issuance of the notice of intent to dismiss petition to petitioner, the Division submitted, among other documents, (i) an affidavit of Michael J. Hall, a law clerk employed in the Office of Counsel of the Division, dated April 11, 2016; (ii) an affidavit, dated March 21, 2016, 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 Presort Mail - Assessments Receivable" (CMR) postmarked November 27, 2013; (iv) an affidavit, dated March 23, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's mail room; and (v) a reproduction of petitioner's resident income tax return for the

² Although petitioner references certain tax returns, he did not attach copies of them to his affidavit.

year 2011, electronically filed on or about February 20, 2012, which lists the same Brooklyn, New York, address as listed on the notice of determination. The 2011 return was the last return filed with the Division by petitioner before the notice of determination was issued.

17. 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. 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 and last pages of the CMR in the present case to the actual mailing date of "11/27/13." In addition, as described by Ms. Nagengast, generally 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 the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

18. 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."

19. The CMR in the present matter consists of 33 pages and lists 361 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 33, which contains nine entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated November 27, 2013 to each page of the CMR, circled the number "361" on page 33 next to the heading "Total Pieces And Amounts" and initialed or signed page 33. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 361.

20. Page 11 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0101 7119 and reference number L-040454828 was mailed to "AHMED - AHMED N" at the Brooklyn, New York, address listed on the notice of determination. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number, the name "AHMED - AHMED N" and address as noted.

21. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Clerk and supervisor in the Division's mail room. The 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 statutory notice is placed in the "Outgoing Certified Mail" basket in the Division's mail room, 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.

22. In this particular instance, the postal employee affixed a postmark dated November 27, 2013 to each page of the 33-page CMR. On page 33, the postal employee also wrote his or her initials or signature and circled the number “361” near the stamp affixed by the clerk requesting that the post office handwrite the total number of pieces and initial the form.

23. Based upon his review of Ms. Nagengast’s affidavit, the exhibits attached thereto and the CMR, Mr. Peltier states that on November 27, 2013, an employee of the mail processing center delivered to a branch of the USPS in Albany, New York, in sealed envelopes for delivery by certified mail a piece of certified mail addressed to petitioner at his Brooklyn, New York, address. 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 November 27, 2013 for the records of the Division. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner on November 27, 2013.

24. In addition to the materials submitted in response to the notice of intent to dismiss (*see* finding of fact 13), petitioner submitted an undated one-page printout, entitled “USPS Tracking” and purportedly from the USPS. The document, offered in reply to the Division’s proof of mailing of the notice of determination, references tracking number 7104 1002 9730 0101 7119, and states “[t]he Postal Service could not locate the tracking information for your request. Please

verify your tracking number and try again later.” Petitioner did not submit any foundational affidavit or other evidence explaining the USPS printout.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination³ by noting that the standard of review for a notice of intent to dismiss petition is the same as that for a motion for summary determination. The Administrative Law Judge then described the standard of review for a motion for summary determination as the same as that for a motion for summary judgment. Such a motion shall be granted if the Administrative Law Judge finds that it has been sufficiently established that no material and triable issue of fact is presented. The proponent of a motion for summary judgment must establish a prima facie showing of entitlement to judgment as matter of law by offering sufficient evidence to eliminate any material questions of fact from the case. If material facts are in dispute or contrary inferences can be drawn from the facts, then a trial is warranted and the motion should be denied. However, the Administrative Law Judge noted that the opposing party must show evidentiary proof in admissible form sufficient to require a trial on material facts on which the claim is predicated.

The Administrative Law Judge then stated the basis on which petitioner based his protest; namely, that the Division mailed the statutory notice here at issue to the wrong address. According to the Administrative Law Judge, where timeliness of a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the statutory notice to the taxpayer’s last known address by proffering proof of its standard mailing

³ The determination of the Administrative Law Judge was a consolidated proceeding of the petitions of Uncle Grocery (DTA No. 827380) and petitioner (DTA 827381). We are considering these matters separately on exception. The description of the determination of the Administrative Law Judge here reflects the determination with regard to petitioner only.

procedure and that such procedure was followed in the particular instance in question. The Administrative Law Judge found that the Division's affidavits described the standard mailing procedure for serving statutory notices on taxpayers and that the procedure was followed in mailing the statutory notice here at issue to petitioner at his last known address. The Administrative Law Judge considered but rejected petitioner's argument that a purported printout of USPS information proved that the certified mail number corresponding to the certified mail number on the CMR for the statutory notice that the Division sent to petitioner never existed. According to the Administrative Law Judge, the document lacked a foundation and did not indicate anything more than the fact that the certified mail number could not be located by the USPS at a specific point in time. The Administrative Law Judge concluded that such bare assertions of non-receipt are insufficient to rebut the presumption of receipt and thus dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner takes exception with the Administrative Law Judge's conclusion of law that the Division demonstrated proper mailing and thus was entitled to the equivalent of summary determination on the question of whether petitioner's protest was timely filed. He claims that the evidence he offered demonstrated a material question of fact regarding the Division's proper mailing of the statutory notice to his last known address and required a hearing on the merits. He claims that the Administrative Law Judge failed to apply the correct standard in reviewing the evidence he presented in opposition to the notice of intent to dismiss petition.

The Division urges this Tribunal to affirm the determination of the Administrative Law Judge. It argues that it bore its burden of proof in demonstrating proper mailing by showing its standard mailing procedure and that such procedure was followed in mailing the notice of

determination here at issue to petitioner at his last known address. The Division argues that the purported USPS tracking information showing that there was no record of the certified mail number corresponding to the certified mail number in the Division's CMR does not raise a material question of whether proper mailing occurred.

OPINION

As a preliminary matter, we agree with the Administrative Law Judge that the standard of review of a notice of intent to dismiss a petition is the same as reviewing a motion for summary determination (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

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 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]).

Under our Rules of Practice and Procedure, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). Thus, a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence to eliminate any material questions of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). However, an opponent to a motion for summary judgment must produce evidence sufficient to require a trial of material questions of fact on which a claim is premised (*Whelan v GTE Sylvania*, 182 AD2d 446

[1992]). Mere conclusory allegations are insufficient to defeat a motion for summary judgment (*New York Natl. Bank v Harris*, 182 AD2d 680 [2d Dept 1992]).

Where timeliness of a petition is at issue, the first line of inquiry is whether the Division has demonstrated proper mailing to the petitioner's last known address (Tax Law § 1147 [a] [1]; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The last known address will generally be the address listed on the taxpayer's last tax return filed with the Division (*Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003). In order to bear its burden of proof of proper mailing, we have held that the Division must show proof of a standard mailing procedure for the issuance of statutory notices and that such a standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

The Tax Law also requires that a notice of determination be mailed by certified or registered mail to a person liable for the collection or payment of the sales and use tax at the taxpayer's last known address (Tax Law § 1138 [a] [1]). Similarly, a notice of determination may be given by mailing the same to the person for whom it is intended at the address given in the last return filed by him (Tax Law § 1147 [a] [1]). Persons liable for the collection or payment of sales and use tax include both corporate officers of vendors subject to sales and use tax and employees under a duty to act for such vendors in collecting and remitting sales and use tax (Tax Law § 1131 [1]).

We agree with the Division that petitioner has not produced evidence that establishes a material, arguable issue of fact regarding the Division's proper mailing of the notice of determination. Here, there was no evidentiary foundation for the single-page printout submitted

in support of petitioner's allegation that the Division failed to mail the notice of determination to the correct address. As no additional information regarding the parameters of the USPS database that was queried in producing the document was included with petitioner's submission, we cannot say that the Administrative Law Judge erred in determining that such a document does not raise a material question of fact regarding the Division's mailing of the statutory notice here at issue. As noted by the Administrative Law Judge, even if viewed in the light most favorable to petitioner, this document merely indicates that no delivery information was available for that particular certified mail number at the time of petitioner's search.

In contrast, the Division's affidavits and papers submitted in response to the notice of intent to dismiss petition demonstrate that the Division had an established procedure for issuance of notices of determination and that such procedure was followed in mailing the notice of determination here at issue to petitioner at his last known address, thus establishing entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*). In order to defeat the notice of intent to dismiss petition, it became incumbent on petitioner to show that a material issue of fact existed requiring a trial on the merits by offering evidence establishing such a question of fact (*see Whelan v GTE Sylvania*). Petitioner is correct that the technical rules of evidence will be disregarded in an administrative proceeding before the Division of Tax Appeals so long as the evidence offered is relevant and material to the issues (*see* 20 NYCRR 3000.15 [d]); however, where, as in the present case, that evidence amounts to a mere assertion that a particular certified mail number cannot be located at a particular time, we must conclude that the evidence that petitioner offered did not rise to the level necessary to demonstrate a material question of fact on the issue of proper mailing of the statutory notice at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ahmed Nagi Ahmed is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Ahmed Nagi Ahmed is dismissed.

DATED: Albany, New York
June 29, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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