STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ABDUL A. SHAMIM	:	DECISION DTA NO. 827636
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 June 1, 2009 through February 29, 2012.	:	

Petitioner, Abdul A. Shamim, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2017. Petitioner appeared by Arthur Morrison, Esq., and IH Accounting Inc. (Irina Herman, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. The Tax Appeals Tribunal allowed both parties the opportunity to file comments regarding petitioner's attempt to submit additional documents with his reply brief. Petitioner did not file any such comments. The six-month period for the issuance of this decision began on July 12, 2017, the date the Division of Taxation filed its comments regarding the additional documents.

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

ISSUE

Whether the petition should be dismissed for lack of subject matter jurisdiction.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact 7, which has been modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. On May 18, 2016, petitioner, Abdul A. Shamim, filed a petition with the Division of Tax Appeals challenging notice of determination number L-042864459.

2. Notice of determination number L-042864459 was dated May 7, 2015 and addressed to petitioner at "5056 46th St, Woodside, NY 11377-7325." The notice assessed tax, penalty and interest totaling $416,839.02 against petitioner under Articles 28 and 29 of the Tax Law for the period June 1, 2009 through February 29, 2012. The notice was issued to petitioner as a responsible person for a corporation named Anika USA, Inc. for the period at issue.

3. The petition included a consolidated statement of tax liabilities, dated April 26, 2016, and pertaining to petitioner (consolidated statement). The consolidated statement reflected notice of determination number L-042864459 as a bill subject to collection action. The petition did not have a copy of the notice of determination attached to it.

4. On several occasions, the Division of Tax Appeals requested a copy of notice of determination number L-042864459 from petitioner to attach to his petition. In response, on May 26 and August 19, 2016, petitioner provided the Division of Tax Appeals with additional copies of the consolidated statement, but not the notice of determination.

5. On October 13, 2016, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition (notice of intent to dismiss) to petitioner that provided, in part:

> In conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the conciliation order or statutory notice being protested.

> Petitioner did not include the required notice of determination, and therefore the petition does not appear to have been timely filed.
>
> Pursuant to § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner has thirty (30) days within which to file a corrected petition. In addition, pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal."

6. In response to the notice of intent to dismiss, petitioner filed a letter that was signed by both him and his representative.[1] The letter asserted that a complete petition was timely filed, and that copies of the necessary exhibit (the notice of determination) were provided as requested to the Division of Tax Appeals by May 26, 2016. Petitioner attached to his letter copies of e-mail exchanges between his representative and the Division of Tax Appeals supporting his assertion that the exhibits were provided. As a result, according to petitioner, the notice of intent to dismiss should be denied.

7. Petitioner's letter in response included another copy of the consolidated statement, but did not include a copy of the notice of determination.

8. The Division of Taxation (Division) asserts that dismissal is appropriate as petitioner failed to timely file his petition. In support of this argument and to prove mailing of notice of determination number L-042864459 on May 7, 2015, the Division provided the following documents: (i) an affidavit, dated November 17, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) an 11-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked May 7, 2015; (iii) an affidavit, dated November 22, 2016, of Bruce Peltier, a stores and operations supervisor in the Division's mail

[1] The signatures on the letter were not notarized, but were certified as "true and accurate under penalty of perjury."

room; (iv) a copy of notice of determination number L-042864459 with cover letter and the associated mailing cover sheet; and (v) a copy of petitioner's New York State resident personal income tax return for the year 2014, described in finding of fact 16.

9. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices from the Division's Case and Resource Tracking System (CARTS). Ms. Nagengast receives the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced 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 and last pages of the CMR, in the present case "5/7/15." 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. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

10. 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 Division's return address on the front, and taxpayer assistance information on the back. The certified control numbers are 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."

11. The CMR relevant to notice of determination number L-042864459 consists of 11 pages and lists 115 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that portions of the CMR that are attached to her 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 May 7, 2015 to each page of the CMR and also wrote his or her initials on each page thereof.

12. Page eight of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0457 0307 and assessment number L-042864459, was mailed to petitioner at the 5056 46th Street, Woodside, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

13. The affidavit of Bruce Peltier, a stores and operation's supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room 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, each page of the CMR contains such postmarks and initials. The mail room 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 handwriting and circling the number "115" on the last page next to his or her initials.

14. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of notice of determination number L-042864459 was mailed to petitioner on May 7, 2015, as claimed.

15. There is no evidence in the record that petitioner filed a request for conciliation conference or petition challenging notice of determination number L-042864459 within 90 days of May 7, 2015.

16. Petitioner electronically filed his New York State resident income tax return for the year 2014 on or about February 21, 2015. This was the last return filed by petitioner with the Division prior to May 7, 2015. On it, petitioner listed his address as "5056 46th St, Woodside, NY 11377."

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the statutes and case law relevant to the timeliness of petitions and described the 90-day statutory period in which a taxpayer may file a petition to protest a notice of determination. In the absence of a timely protest, the Administrative Law Judge noted that the Division of Tax Appeals would lack jurisdiction to consider the merits of the petition.

The Administrative Law Judge explained that where, as here, the 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 being protested. If the Division can demonstrate such proper mailing, a presumption is created that the statutory notice was delivered in the normal course of the mail. The Administrative Law Judge elucidated that to demonstrate proper mailing, the

Division may proffer proof of its standard mailing procedure and proof 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 such procedure was followed in the mailing of the notice of determination to petitioner herein. Thus, the Administrative Law Judge found that the notice of determination was properly mailed to petitioner on May 7, 2015. The Administrative Law Judge then determined that the petition filed on May 18, 2016 was untimely, as it was filed in excess of the 90-day period following May 7, 2015. As such, the Administrative Law Judge concluded that the Division of Tax Appeals did not have jurisdiction to consider the merits of petitioner's protest. The Administrative Law Judge also concluded that petitioner's argument that his provision of the consolidated statement alone was sufficient to constitute a valid petition was rendered moot by the absence of petitioner's proof of the filing of a timely petition. Accordingly, the Administrative Law Judge dismissed the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner avers for the first time on exception that he did not receive the notice of determination. Furthermore, petitioner asserts that the information contained within the consolidated statement that he submitted with his petition contains all the information required by the Tax Appeals Tribunal Rules of Practice and Procedure (rules) (***see*** 20 NYCRR 3000.3 [b]. Based upon these assertions, petitioner argues that he was not required to submit the notice of determination with his petition and that he should be allowed to proceed based upon on the consolidated statement referencing the notice of determination that he did submit.

Petitioner also avers for the first time on exception that he had a valid power of attorney on file for a representative at the time the notice of determination was issued, and that the Division failed to mail a copy of the notice of determination to that representative. Therefore, petitioner argues, his time to file his petition has not yet expired as failure to provide the representative with a copy of the notice of determination tolls the 90-day period to file the petition.

Petitioner argues that pursuant to Tax Law § 1138 (a) (3) (B), a timely petition filed by the corporate entity in this matter is deemed to include a petition for any alleged responsible officer of the corporate entity.

Finally, in his reply brief and regarding the substance of the case, petitioner argues that sufficient records existed for the Division to have conducted an audit, but that such records were taken and lost by the New York Police Department. Included with petitioner's reply brief were copies of correspondence from the New York Police Department in support of this argument.

In response to petitioner's exception, the Division merely references the documents it submitted to the Administrative Law Judge; makes general allegations that the facts averred by petitioner in support of his exception are not supported by the record; and asserts that petitioner's requested legal conclusions have no basis in law.

In response to petitioner's attempt to introduce documents into the record with his reply brief on exception, the Division argues that based upon long-standing precedent of this Tribunal, the record was closed prior to such submission and therefore the Tribunal should reject petitioner's attempt to submit the additional documents on exception.

OPINION

We first observe that the determination of the Administrative Law Judge followed the Division of Tax Appeals' issuance of a notice of intent to dismiss petition made pursuant to our

rules (20 NYCRR 3000.9 [a] [4]). Thus, we begin by describing the standard of review for a dismissal following a notice of intent, which is the equivalent of that used in reviewing a motion for summary determination (***Matter of Victory Bagel Time, Inc.***, Tax Appeals Tribunal, September 13, 2012). Our rules provide that 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" (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 [2d Dept 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 [2d Dept 1989])" (***Matter of United Water New York, Inc.***, Tax Appeals Tribunal, April 1, 2004).

In order to determine if dismissal of the petition is appropriate in this case, we begin by discussing the requirements for bringing a case before the Division of Tax Appeals. A proceeding in the Division of Tax Appeals is commenced by filing a petition "protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing" (Tax Law § 2008 [1]), pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law § 2006 [4]). The statutory notice giving rise to a hearing in this matter was the notice of determination, a document not included with the petition filed in this matter, and not the consolidated statement that petitioner submitted with his

petition (***see*** Tax Law § 1138 [a] [1]). Despite this flaw, petitioner contends that his petition was valid and should not be dismissed based upon his failure to submit the notice of determination.[2]

First, petitioner argues that he did not receive the notice of determination and therefore could not file it with his petition. We do not require that a petitioner provide a copy of a notice from the Division that the petitioner asserts he did not receive ***(Matter of Kokotas***, Tax Appeals Tribunal, December 11, 2015). However, petitioner in this case did not assert that he did not receive the notice of determination during the proceedings before the Administrative Law Judge, and, in any event, a copy of the notice of determination was submitted into the record by the Division in its response to the notice of intent. Therefore, petitioner's failure to provide a copy of the notice of determination is of no consequence at this point. Furthermore, petitioner is not allowed to raise this argument for the first time on exception. We have continuously held that new legal issues may be raised on exception, provided such issues do not necessarily raise questions of fact (***see e.g. Matter of Ragozin***, Tax Appeals Tribunal, July 22, 1993). Whether or not petitioner received the notice of determination is clearly a question of fact and thus petitioner is precluded from making this argument for the first time before the Tribunal (***id.***). In any event, there is no evidence in the record to support petitioner's assertion that he did not receive the notice of determination.

Second, petitioner argues that, as the petition contains all of the information required by our rules, it should not be dismissed. It is true that the petition as filed contains some required information, for example: identifying information for petitioner; tax type at issue; tax amount at

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[2] We note that perhaps some confusion in this case could have been avoided if either the Division of Tax Appeals or the Division had responded to petitioner's repeated submission of copies of the consolidated statement by attempting to explain to petitioner that the consolidated statement was not the equivalent of the notice of determination and that what petitioner needed to submit was a copy of the actual notice of determination that was referenced in the consolidated statement. Instead, all petitioner received were more requests for the notice of determination or more statements that he had not submitted it.

issue; tax periods at issue; and the identifying number of the notice of determination (***see*** 20 NYCRR 3000.3 [b]). However, the rules also provide that the petition shall contain "for the sole purpose of establishing the timeliness of the petition, a legible copy of the order of the conciliation conferee if issued; if no such order was previously issued, a legible copy of any other statutory notice being protested" (20 NYCRR 3000.3 [b] [8]).[3] As previously noted, the statutory notice giving rise to a hearing in this matter was the notice of determination, a document not included with the petition filed in this matter, and not the consolidated statement that petitioner submitted with his petition (Tax Law § 1138 [a] [1]). Again, it is noted that petitioner's failure to provide a copy of the notice of determination is of no consequence, where, as here, the Division submitted a copy of the notice into evidence.

Thus, we now turn to the question of whether a timely petition was filed utilizing the copy of the notice of determination submitted into evidence by the Division. A taxpayer is entitled to protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the issuance of such a notice (Tax Law §§ 1138 [a]; 2006 [4]). As noted by the Administrative Law Judge, it is well established that such time limits are strictly enforced and, accordingly, protests filed even one day late are considered untimely (***Matter of American Woodcraft***, Tax Appeals Tribunal, May 15, 2003; ***Matter of Maro Luncheonette***, Tax Appeals Tribunal, February 1, 1996). This is because in the absence of a timely protest, a statutory notice, to which protest rights attach, becomes fixed and final and the Division of Tax Appeals is without jurisdiction to consider the substantive merits of a late-filed protest (***see Matter of Modica***, Tax Appeals Tribunal, October 1, 2015; ***Matter of Lukacs***, Tax Appeals

[3] It is uncontested in this matter that no request for conciliation conference was timely filed by petitioner. Accordingly, the alternative requirement to file such a request rather than a petition will not be mentioned further in this decision.

Tribunal, November 8, 2007; ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

Where, as here, the timeliness of a taxpayer's protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. This is achieved by the Division demonstrating the fact and date of proper mailing of the statutory notice (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). A notice of determination is issued when it is properly mailed via certified or registered mail, and it is properly mailed when it is delivered into the custody of the USPS properly addressed to the taxpayer at his or her last known address (Tax Law § 1138 [a] [1]). The Division can meet its burden of proving proper mailing of the statutory notice at issue by providing evidence of its standard mailing procedure and that such procedure was followed in this instance (***see Matter of Accardo***, Tax Appeals Tribunal, August 12, 1993). The Division's proper mailing of a notice of determination gives rise to a rebuttable presumption of receipt by the taxpayer to whom the same is addressed (Tax Law § 1147 [a] [1]; ***Matter of Katz***; ***see also Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.***, 97 AD2d 634 [3d Dept 1983], ***affd*** 64 NY2d 688 [1984]).

We agree with the Division that the Administrative Law Judge correctly determined that it demonstrated proper mailing of the notice of determination dated May 7, 2015. The Division has provided adequate proof of its standard mailing procedure and that such procedure was followed in this instance through the affidavits of its employees, Ms. Nagengast and Mr. Peltier. The attached CMR indicates that a piece of certified mail bearing the numerical information on the notice was mailed to petitioner at the address listed on petitioner's resident income tax return filed on or about February 21, 2015, which was the last return filed with the Division before the

date of the notice's issuance. We agree with the Administrative Law Judge that the CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the fact and date of mailing of the notice of determination (***see Matter of Rakusin***, Tax Appeals Tribunal, July 26, 2001).

The proper issuance of a statutory notice starts the 90-day period in which to file a timely protest of the proposed assessment (Tax Law §§ 1138 [a] [1]). In this case, petitioner failed to offer any evidence to rebut the presumption of receipt of the statutory notice. Thus, we concur with the Administrative Law Judge that petitioner has failed to bear his burden of proof in showing that the protest in this matter was timely filed. Petitioner has not even raised a question of fact that would require a hearing on the issue of timeliness.

We next turn to petitioner's argument that his protest should be deemed timely because his purported representative was not served with a copy of the notice of determination when it was issued. We note that the record does not contain a copy of a power of attorney naming the representative whom petitioner claims was not served with a copy of the notice. While the Tax Law does not specifically provide for service of the statutory notice on a taxpayer's representative, our prior decisions have consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (***see Matter of Nicholson***, Tax Appeals Tribunal, June 12, 2003; ***Matter of Kushner***, Tax Appeals Tribunal, October 19, 2000; ***Matter of Brager***, Tax Appeals Tribunal, May 23, 1996; ***Matter of Multi Trucking***, Tax Appeals Tribunal, October 6, 1988). Such a period of tolling is not indicated in this case, however, as petitioner has not shown that he had designated his purported representative at the time of the issuance of the statutory notice at issue.

For similar reasons, we must reject petitioner's argument that the notice of determination here at issue be deemed to have been timely protested by operation of Tax Law § 1138 (a) (3) (B). That section of the Tax Law deems a corporate entity's timely protest of a notice of determination to be a timely protest by any of its responsible persons, thus abrogating their need to file individual protests on their own behalf. However, petitioner offered no evidence of a corporate entity's timely protest in response to the notice of intent. Without more, petitioner's argument amounts to no more than an unsupported assertion and is insufficient to bear his burden of showing a material and triable issue of fact counterindicating dismissal in this case.

In light of the Division's demonstration of proper mailing of the notice of determination to petitioner, we must conclude that the 90-day period for a timely protest of the notice of determination began on May 7, 2015. As the petition in this matter was not filed until May 18, 2016, we conclude that the petition was untimely and the Division of Tax Appeals lacks jurisdiction to hear the merits of petitioner's protest.

As the petition in this matter has been dismissed, we do not reach petitioner's argument on the merits nor the issue of petitioner's attempt to submit additional evidence on exception.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Abdul A. Shamim is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Abdul A. Shamim is dismissed.

DATED: Albany, New York
January 11, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner