

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SIMON ROSENBAUM : DECISION
 : DTA NO. 828214
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, 2015 through August 31, 2015. :

Petitioner, Simon Rosenbaum, filed an exception to the determination of the Administrative Law Judge issued on February 22, 2018. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller (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. Oral argument was not requested. The six-month period for issuance of this decision began on May 7, 2018, the date petitioner's letter brief in reply was received.

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

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 1, 2 and 5, which we have modified for clarity and to more accurately reflect the record. We

have also added a new finding of fact numbered 12 herein. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

1. The Division of Taxation (Division) brought a motion dated October 23, 2017 for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of determination, dated June 3, 2016, and bearing assessment identification number L-044906285 (notice). The notice is addressed to petitioner, Simon Rosenbaum, at an address in Brooklyn, New York. Petitioner was assessed sales and use taxes of \$1,605.67 plus penalty and interest as a responsible person of Rosenbaum's Food Center, Inc.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On May 26, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on June 3, 2016, but the request was not mailed until May 12, 2017, or in excess of 90 days, the request is late filed."

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on June 5, 2017.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with the affidavit of Barry S. Weinstein, Esq., sworn to on October 23, 2017, the following with its motion papers: (i) an affidavit, dated September 25, 2017, of Deena Picard, a

Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 3, 2016; (iii) an affidavit, dated September 29, 2017, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the notice with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference, signed by petitioner on May 11, 2017, bearing a May 11, 2017 postmark, and in-dated by BCMS on May 15, 2017; and (vi) a copy of petitioner's electronically filed 2015 New York resident income tax return, filed on April 18, 2016, which lists the same address for petitioner as that listed on the notice.¹ The 2015 income tax return was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 page of the CMR in the present case to the actual mailing date of "6/3." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are

¹ We note our disagreement with the Administrative Law Judge's finding that the postmark was illegible.

delivered into possession of the United States 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.

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 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."

8. The CMR in the present matter consists of 13 pages and lists 136 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 13, which contains 4 entries. Ms. Picard 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 June 3, 2016, to each page of the CMR, wrote and circled the number "136" on page 13 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 13.

9. Page six of the CMR indicates that a notice with certified control number 7104 1002 9730 0847 8869 and reference number L-044906285 was mailed to petitioner at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the

Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room, describes the mail room’s general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives 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 first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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 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 CMR. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of June 3, 2016. On page 13, corresponding to “Total Pieces and Amounts,” is the preprinted number 136 and next to “Total Pieces Received At Post Office” is the handwritten and circled entry “136.” There is a set of initials or a signature on page 13.

11. According to both the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on June 3, 2016, as claimed.

12. The notice advises petitioner that if he disagrees with the amount due he may either

file a request for a conciliation conference or a petition for a hearing in the Division of Tax Appeals. The notice further advises petitioner that either form of protest must be filed by September 1, 2016.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that a motion for summary determination is the proper vehicle to consider the timeliness of petitioner's request and then he reviewed the standards for the granting of such a motion. He noted that a proponent of a motion for summary determination must provide sufficient evidence to establish entitlement to judgment as a matter of law and that such a motion should be denied if material facts are in dispute or arguable. The Administrative Law Judge explained that the opponent of a motion for summary determination must come forward with evidentiary proof in admissible form to require a trial of questions of material fact.

The Administrative Law Judge noted that petitioner did not respond to the Division's motion and, thus, presented no evidence to contest the facts alleged in the Division's affidavits concerning the fact and date of mailing. As such, those facts were deemed admitted and petitioner was deemed to have conceded that no questions of material fact existed.

Next, the Administrative Law Judge cited the statutory provision that provides for administrative review if a taxpayer files a timely protest of a notice of determination and he reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge observed that where the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice to the petitioner's last known

address. The Administrative Law Judge found that, in order to do so, the Division must show proof of a standard mailing procedure and that its standard mailing procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division had offered proof sufficient to establish that the notice was properly mailed to petitioner's last known address on June 3, 2016. The Administrative Law Judge found that the Division proved its standard mailing procedure through the affidavits of Division employees familiar with the procedure for issuing statutory notices. He also observed that the CMR was properly completed and found that the employees' affidavits, along with the properly completed CMR, showed that the Division's standard mailing procedure was followed in this instance. The Administrative Law Judge also found that the address on the mailing cover sheet and CMR conforms with the address listed on petitioner's 2015 e-filed resident income tax return, which satisfies the last known address requirement.

The Administrative Law Judge finally determined that because the Division established that it properly mailed the notice on June 3, 2016, the statutory 90-day time limit for petitioner to file a protest commenced on that date. He found that the postmark date on the envelope bearing petitioner's request for a conference was partially illegible, with only the month (May) and the year (2017) being legible. Viewing the evidence in the light most favorable to petitioner, he determined that the earliest the request for conference could have been filed was May 11, 2017, the date petitioner signed the request. Since that date fell after the 90-day period of limitation to file such a request, the Administrative Law Judge concluded that the request was untimely and that it was properly dismissed by the May 26, 2017 order issued by BCMS. Thus, he granted the Division's motion for summary determination.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he was no longer an owner of the Rosenbaum Food Center, Inc. during tax years 2015 and 2016 and was not responsible for the asserted tax liability. He also argues that he did not receive the original assessment or the Division's motion for summary determination and was unaware of the proceeding against him, thereby precluding a timely response to the motion.

The Division contends that the Administrative Law Judge correctly determined that it proved proper mailing of the subject notice on June 3, 2016 and, accordingly, correctly determined that petitioner's request for a conciliation conference was untimely. It observes that petitioner does not claim that his request for conciliation conference was timely. Accordingly, the Division asserts that the Administrative Law Judge correctly granted summary determination, as petitioner failed to respond to the Division's motion below and thus failed to present any evidence to raise a material issue of fact that would require a hearing. Finally, the Division argues that the Tribunal should not consider documentation submitted by petitioner for the first time on exception.

OPINION

We note that the petition in this matter was filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation order dismissing petitioner's request for a conciliation conference and, as such, we concur with the Administrative Law Judge that the Division of Tax Appeals has jurisdiction over the petition (*see* Tax Law §§ 170 [3-a] [a], [e] and 2006 [4]; *Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991). We also agree with the Administrative Law Judge that where the Division of Tax Appeals has

jurisdiction over a petition, a motion brought to dismiss the petition or, in the alternative, for summary determination, is properly treated as a motion for summary determination (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

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]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). “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 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [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 [1968]). 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 [2d Dept 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, 449 [1st Dept 1992] *quoting Zuckerman v City of New York*, 49 NY2d at 562).

Tax Law § 1138 (a) (1) authorizes the Division to mail notices of determination to a person or persons liable for the collection or payment of tax at his or her last known address using

certified or registered mail (*see also* Tax Law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of that notice by the person to whom it is addressed (*id*). The Division is entitled to rely on the address listed on the last return filed with the Division as the last known address, unless the taxpayer has clearly informed the Division of a change of address (*Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003; Tax Law § 1147 [a] [1]). With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition for hearing with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (Tax Law § 1138 [a] [1]). A person also has the option of commencing an administrative challenge to such notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]. The Division of Tax Appeals lacks jurisdiction to consider the merits of a late filed protest (*see e.g. Matter of Garitta*).

Where, as here, the timeliness of a taxpayer’s request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date 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 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; *Matter of Katz*). 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 Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

We agree with the Administrative Law Judge's conclusion that the Division's proof establishes that the subject notice was mailed to petitioner's last known address on June 3, 2016. Specifically, we find that the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue. We also agree with the Administrative Law Judge's determination that the CMR was properly completed and, together with proof of the Division's standard mailing procedure, constitutes highly probative evidence of both the fact and date of mailing of the subject notice (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). Additionally, the address on the mailing cover sheet and CMR entry is the same as the address listed on petitioner's 2015 e-filed resident income tax return. This satisfies the last known address requirement in Tax Law § 1138 [a]. The Division thus properly mailed the notice at issue to petitioner on June 3, 2016 and the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). Accordingly, any request for conciliation conference or petition filed by petitioner was required to be filed by September 1, 2016. Petitioner's request for conciliation conference, postmarked and thus deemed filed on May 11, 2017 (*see* 20 NYCRR 4000.7 [a] [1] [ii]), was therefore untimely and properly dismissed by

BCMS.²

Having found that the Administrative Law Judge correctly determined that the Division bore its burden of demonstrating proper mailing of the notice, we note that such a showing gives rise to a presumption of receipt of the notice by the person to whom it is addressed (*see* Tax Law § 1147 [a] [1]). Here, petitioner does not contest that the Division properly mailed the notice to his address; instead, he merely asserts that he did not receive it, possibly due to a mail delivery problem. We have considered this argument; however, we must reject it because the mere denial of receipt of the notice without more (such as evidence of the post office failure to deliver the notice) is not sufficient to overcome the statutory presumption of receipt (*see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]).

Given petitioner's untimely protest, we are precluded from addressing petitioner's argument that he is not liable for the tax due because he was not a responsible person of Rosenbaum Food Center, Inc. during the 2015 and 2016 tax years (*Matter of Garitta*).

Finally, petitioner presented documents with his exception that were not a part of the proceeding below. We observe that those documents do not pertain to the issue of the timeliness of petitioner's request for conciliation conference. Consistent with "our longstanding policy against considering evidence that was not made part of the record below," we do not accept into the record the documents submitted by petitioner and have not considered them in the rendering

² As noted, the Administrative Law Judge determined that the date stamped on the envelope containing petitioner's request for conciliation conference was not completely legible. Under such circumstances, the person required to file the document has the burden of proving when the postmark was made (*see* 20 NYCRR 4000.7 [a] [2] [iii] [a]). However, the Administrative Law Judge hypothesized that the earliest date the request for conciliation conference could have been postmarked was May 11, 2017, the date that petitioner signed the request, and thus used that date as the date of filing. While we find that the postmark date is legible as May 11, 2017, we arrive at the same conclusion as the Administrative Law Judge, to wit: that the request was filed well-beyond the 90-day statutory limit for such filing.

of this decision (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014, *citing Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Simon Rosenbaum is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Simon Rosenbaum is denied; and
4. The conciliation order dismissing request is sustained.

DATED: Albany, New York
November 5, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner