

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition¹ :
of :
EMAD MOHAMED : **DECISION**
 : **DTA NO. 828953**
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2010 through November 30, 2014. :
:

Petitioner, Emad Mohamed, filed an exception to the determination of the Administrative Law Judge issued on July 25, 2019. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner’s request for oral argument was denied. The six-month period for the issuance of this decision began on November 8, 2019, the date that petitioner’s reply brief was received.

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

ISSUES

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination bearing assessment number L-041398507.

¹ The petition in this matter was filed under the name “Emad Mohamed/Amona Deli Corp.” and challenged several statutory notices, some in Mr. Mohamed’s name and others in the name of Mr. Mohamed’s business, Amona Deli Corp. The Division of Tax Appeals separated the protests by taxpayer and assigned the protested notices in Mr. Mohamed’s name DTA No. 828953 and the protested notices in Amona Deli Corp.’s name DTA No. 828880.

II. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order bearing CMS No. 270493.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. Petitioner, Emad Mohamed, requested a copy of the Division of Tax Appeals petition form (TA-100) on or before April 25, 2018. The Division of Tax Appeals mailed a petition form and a copy of the New York State Tax Appeals Tribunal Rules of Practice and Procedure to petitioner on April 25, 2018.

2. Months later, petitioner called to inquire about the status of the case. The Division of Tax Appeals informed petitioner that a petition had not been received. Petitioner claimed that a petition had been filed via United Parcel Service (UPS) on May 25, 2018. The Division of Tax Appeals instructed petitioner to mail another copy of the petition, together with the proof of mailing for the May 25, 2018 filing.

3. Petitioner mailed a copy of the petition, which was received by the Division of Tax Appeals on September 7, 2018. Petitioner also provided a copy of a Staples customer receipt indicating that a submission had been mailed to the Division of Tax Appeals via UPS on May 25, 2018. While the addressee information on the receipt is correct, the Division of Tax Appeals did not receive the May 25, 2018 submission. As petitioner provided proof of mailing, the filing date of the petition is deemed to be May 25, 2018.

4. The petition included a copy of two notices of determination bearing assessment numbers L-041398507 and L-044470534, dated as issued to petitioner on June 6, 2014 and

February 29, 2016, respectively. The petition also included a copy of a consolidated statement of tax liabilities bearing the assessment numbers, dated as issued to petitioner on May 10, 2017.

5. Petitioner checked the box on the petition indicating that a conciliation conference had not been requested.

6. The petition challenges only the foregoing notices, and there were no other statutory notices attached to the petition.

7. On February 15, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent) with respect to the petition. The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notices of determination, the petition was not timely filed.

Furthermore, the notice of intent held that the consolidated statement of tax liabilities is insufficient to confer jurisdiction upon the Division of Tax Appeals.

Notice of Determination Assessment Number L-041398507

8. In response to the issuance of the notice of intent, the Division of Taxation (Division) provided the following: (i) the affidavit of Stephanie Scalzo, an attorney employed in the Office of Counsel of the Division²; (ii) a copy of the June 6, 2014 notice of determination with the associated mailing cover sheet addressed to petitioner; (iii) an affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS), dated March 18, 2019; (iv) a “Certified Record for Presort Mail - Assessments Receivable (CMR)” postmarked June 6, 2014; (v) an affidavit of Fred Ramundo, a supervisor in the Division’s mail room, dated March 20, 2019; and (vi) a copy of petitioner’s IT-201 for the tax year 2013, filed on April 15, 2014. This tax return lists the same

² The determination misidentified the Division attorney who completed the affidavit.

address for petitioner as that listed on the notice of determination and the petition and was the last tax return filed with the Division before the notice of determination was issued.

9. The affidavit of Deena Picard, who has been in her current position since May 2017, and 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 their 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 "6/6/14." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the 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.

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 Departmental return address on the front, and the 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."

11. The June 6, 2014 CMR consists of 29 pages and lists 308 certified control numbers along with corresponding assessment numbers, names and addresses. Each page consists of 11 entries, except for page 29, which contains no 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 6, 2014 to each page of the CMR, circled the number "308" on page 29, next to the heading "Total Pieces Received at Post Office" and initialed or signed page 29 of the CMR.

12. Page 14 of the CMR indicates that a notice with certified control number 7104 1002 9730 0244 0114 and reference number L-041398507 was mailed to petitioner at the Bellerose, New York, address listed on that 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.

13. The affidavit of Fred Ramundo describes the general operations and procedures within the Division's mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room regarding statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Mr. Ramundo confirms that 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, so that the address and certified number from the mailing cover sheet shows through the window. 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee 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. As noted, each page of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark dated June 6, 2014. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 308 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on June 6, 2014.

14. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner on June 6, 2014, as claimed.

Notice of Determination Assessment Number L-044470534

15. In response to the issuance of the notice of intent, the Division of Taxation (Division) provided the following: (i) the affidavit of Stephanie Scalzo, an attorney employed in the Office of Counsel of the Division; (ii) a copy of the request for conciliation conference protesting assessment number L-044470534, stamped as received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on May 9, 2016; (iii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated March 20, 2019; (iv) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked October 14, 2016; (v) a copy of the conciliation order, cover letter and cover sheet, dated October 14, 2016, as well as a copy of the three-windowed

mailing envelope used to mail the order; and (vi) an affidavit of Fred Ramundo, dated March 25, 2019.

16. Unknown to the Division of Tax Appeals, petitioner filed a request for conciliation conference protesting assessment number L-044470534, resulting in the issuance of a conciliation default order (CMS No. 270493). As such, regarding notice of determination number L-044470534, this determination will address the timeliness of the petition following the issuance of the conciliation default order.

17. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

18. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

19. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

20. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded

on the CMR under the heading “Certified No.” The BCMS numbers are recorded on the CMR under the heading “Reference No.” and are preceded by three zeros (000). The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

21. The clerk’s regular duties include associating each cover sheet, cover letter, and conciliation order. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

22. The “Total Pieces and Amounts” is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps “MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT:” on the bottom left corner of the CMR.

23. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, “10-14-16” was written in the upper right corner of each page of the CMR.

24. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from BCMS by an employee of the Division’s Mail Processing Center.

25. Mr. Farrelly attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by the Division on October 14, 2016. The CMR lists 44 certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified

control number is a reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

26. Information regarding the conciliation order issued to petitioner is contained on page 3 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0035 9463 is reference or CMS number 000270493, along with the name and last known address of petitioner. Specifically, the Bellerose, New York, address listed on the CMR is the same address referenced on the request for conciliation conference and the petition filed with the Division of Tax Appeals.

27. The affidavit of Fred Ramundo explains that after a conciliation order is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control 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.

28. In this instance, the postal employee affixed a postmark dated October 14, 2016, to each page of the five-page CMR. The postal employee wrote and circled the number “44” on page 1, circled the number “44” on page 5 and initialed page 5 to indicate the total pieces of mail received at the post office.

29. Mr. Ramundo stated that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo’s staff on the following day after its initial delivery and is then

delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

30. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on October 14, 2016, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his Bellerose, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. 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 October 14, 2016, for the records of BCMS. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner on October 14, 2016.

31. In his response to the notice of intent to dismiss petition, petitioner submitted a letter, claiming, in pertinent part, that it is unclear how or why an assessment was issued against the business at a time when the business was not in operation.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the standard of review in the present matter is the same as that of a summary determination motion. The Administrative Law Judge pointed out that such a motion may be granted where no material issue of fact exists.

The Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition following both the issuance of a notice of determination and the issuance of a conciliation order. The Administrative Law Judge also observed that the Division bears the burden of establishing that it mailed the relevant statutory notice to the taxpayer's last known

address using certified or registered mail. The Administrative Law Judge noted the well-established rule that the Division must establish its standard mailing procedure and that such procedure was followed in a particular case in order to meet this burden.

The Administrative Law Judge found that the Division met its burden and established that the subject notice of determination was properly mailed to petitioner on June 6, 2014. The Administrative Law Judge determined that the submitted affidavits and the CMR establish both the Division's general mailing procedure and that such procedure was followed with respect to the subject notice of determination. The Administrative Law Judge also found that the address to which the notice of determination was mailed was petitioner's last known address.

The Administrative Law Judge also concluded that the Division met its burden and established that the subject conciliation order was properly mailed to petitioner on October 14, 2016. The Administrative Law Judge found that the submitted affidavits and the CMR establish both the Division's general mailing procedure and that such procedure was followed with respect to the subject conciliation order. The Administrative Law Judge also found that the address to which the conciliation order was mailed was petitioner's last known address.

The Administrative Law Judge thus concluded that the petition in the present matter, deemed filed on May 25, 2018, was filed more than 90 days from the date of issuance of both the June 6, 2014 notice of determination and the October 14, 2016 conciliation order. Accordingly, he dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner asserts that he relied on his accountant to meet his business's sales tax obligations. As he did below, petitioner questions the accuracy of the assessment. Petitioner also asserts that the business has subsequently failed; that he has experienced significant

financial difficulties and health problems; and that he is unable to afford representation on this appeal. Petitioner does not address the issue of the timeliness of the petition.

The Division asserts that the determination was correct and should be affirmed.

OPINION

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

"The proponent of a summary judgment [or determination] 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 (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opponent of such a motion "must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice, with certain

exceptions not relevant here (Tax Law § 1138 [a] [1]). Absent such a timely filed protest, a notice of determination becomes an assessment subject to collection (*id.*).

Alternatively, a taxpayer may protest a notice of determination 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]). A conciliation conference may result in the issuance of a conciliation order. A conciliation order is issued when mailed (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). A conciliation order is binding upon a taxpayer unless the taxpayer files a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of the order, with exceptions not relevant here (Tax Law § 170 [3-a] [e]).

A petition filed following the issuance of a notice of determination or a conciliation order must be timely filed to confer jurisdiction on the Division of Tax Appeals to consider the merits of the protest (*see e.g. Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Chimiak*, Tax Appeals Tribunal, September 19, 2019; Tax Law § 2006 [4]).

Where the timeliness of a taxpayer’s petition is in question, following either the issuance of a notice of determination or a conciliation order, the Division has the burden to prove the date and fact of mailing of the statutory notice, by certified or registered mail, to the taxpayer’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by “producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

The Division has met its burden here.

The affidavits of Ms. Picard and Mr. Ramundo establish the Division's standard mailing procedures in issuing notices of determination. The CMR postmarked June 6, 2014 has been properly completed and thus shows that the Division's standard mailing procedure was followed with respect to the mailing of the notice of determination to petitioner (*id.*). Furthermore, there is no dispute that the notice of determination bears petitioner's correct address.

The affidavits of Mr. Farrelly and Mr. Ramundo establish the Division's standard mailing procedures in issuing conciliation orders. The CMR postmarked October 14, 2016 has been properly completed and thus shows that the Division's standard mailing procedure was followed with respect to the mailing of the conciliation order to petitioner (*id.*). Additionally, the cover sheet associated with the conciliation order bears petitioner's correct address.

Accordingly, we agree with the Administrative Law Judge's conclusions that the subject notice of determination was properly mailed to petitioner on June 6, 2014 and that the subject conciliation order was properly mailed to petitioner on October 14, 2016, as claimed.

As noted, petitioner had 90 days from the June 6, 2014 mailing of the notice of determination and 90 days from the October 14, 2016 mailing of the conciliation order to file a petition with the Division of Tax Appeals. The petition in the present matter, deemed filed on May 25, 2018, was filed well-beyond these time limits. While we are sympathetic to petitioner's personal and financial circumstances, we may not consider the merits of the protest, as we lack jurisdiction to do so (*Matter of Ahmed; Matter of Chimiak*).

The Administrative Law Judge thus properly dismissed the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Emad Mohamed is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Emad Mohamed is dismissed.

DATED: Albany, New York
May 1, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner