

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CARMEN R. ALTAMIRANO	:	DECISION
for Revision of Determinations or for Refund of Sales and	:	DTA NO. 830591
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Periods December 1, 2016 through February 28, 2017 and	:	
March 1, 2018 through May 31, 2020.	:	

Petitioner, Carmen R. Altamirano, filed an exception to the determination of the Administrative Law Judge issued on July 21, 2022. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for issuing a decision in this matter began on September 23, 2022, 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.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of 10 statutory notices.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact

5, which we have modified to more fully reflect the record. The modified finding of fact, together with the findings of facts as determined by the Administrative Law Judge, are set forth below.

1. The Division of Taxation (Division) issued to petitioner, Carmen R. Altamirano, at a “XXXX STEINWAY ST APT XX LONG ISLAND CITY, NY 11101-1531,” address¹, a series of statutory notices, each dated February 17, 2021, as follows:

a. notice of estimated determination L-052899109 that assessed sales and use taxes for the period March 1, 2020 through May 31, 2020;

b. notice of estimated determination L-052899110 that assessed sales and use taxes for the period December 1, 2019 through February 29, 2020;

c. notice of estimated determination L-052899111 that assessed sales and use taxes for the period September 1, 2019 through November 30, 2019;

d. notice of determination L-052899112 that assessed sales and use taxes for the period June 1, 2019 through August 31, 2019;

e. notice of determination L-052899113 that assessed sales and use taxes for the period March 1, 2019 through May 31, 2019;

f. notice of determination L-052899114 that assessed sales and use taxes for the period December 1, 2018 through February 28, 2019;

g. notice of determination L-052899115 that assessed sales and use taxes for the period December 1, 2016 through February 28, 2017;

h. notice of determination L-052899116 that assessed sales and use taxes for the period September 1, 2018 through November 30, 2018;

¹ To protect petitioner’s privacy, identifiable characteristics of petitioner’s mailing address have been redacted.

i. notice of determination L-052899117 that assessed sales and use taxes for the period June 1, 2018 through August 31, 2018; and

j. notice of determination L-052899118 that assessed sales and use taxes for the period March 1, 2018 through May 31, 2018.

Each of the three notices of estimated determination was issued because petitioner was determined to be an officer or responsible person of Embers Steakhouse Inc. (Embers Steakhouse) and advised that an estimated assessment had been issued because a required tax return was not filed by Embers Steakhouse. The seven notices of determination were also issued because petitioner was determined to be an officer or responsible person of Embers Steakhouse.

2. Petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices L-052899118, L-052899117, L-052899116, L-052899115, L-052899114, L-052899113, L-052899112, L-052899111, L-052899110, and L-052899109. Petitioner's address on the request was listed as "XX-XX Steinway Street Apt. XX, Long Island City, N.Y. 11101." The undated signature of petitioner appears on both the request and the accompanying explanation letter. The request was faxed to and received by BCMS on June 14, 2021.

3. On July 16, 2021, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000330572) to petitioner. The order determined that petitioner's protest of the 10 statutory notices, i.e. notice numbers L-052899118; L-052899117; L-052899116; L-052899115; L-052899114; L-052899113; L-052899112; L-052899111; L-052899110; and L-052899109, 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 February 17, 2021, but the request was not faxed until June 14, 2021, 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 August 5, 2021. The petition was date stamped received by the Division of Tax Appeals on August 9, 2021. In her petition, petitioner listed her address as “XX-XX Steinway St. apt. XX L.I.C. NY 11101.” Petitioner, in her petition, asserted that she sent a request to protest and disagree with the 10 assessments when she first got them. She further asserted that on February 26, 2021, she called an unidentified number in Albany and some unidentified individuals told her to fill out a DTF-95 and send it with a letter explaining why she should not be paying these assessments. Petitioner also claimed that those unidentified individuals gave her “Agent Center’s contact” information, and she “kept asking Agent Center for an in-person meeting” that would include herself and a named third party who used her name and information but actually “owes this money.” In her petition, petitioner also claimed that Agent Center “said that there will be no meeting because of the pandemic.” She further claimed that the named third party “has a contact with the NY taxes and is slowly paying the money but bills keep coming back” to her. The only attachment to the petition was a copy of the conciliation order dated July 16, 2021.

5. The Division brought a motion, dated March 23, 2022, seeking an order dismissing the petition or, in the alternative, summary determination. The subject of the Division’s motion was the timeliness of petitioner’s protest of the 10 notices of determination, dated February 17, 2021. As noted above (*see* finding of fact 1), the notices were addressed to petitioner at an address on Steinway Street in Long Island City, New York.

To show proof of proper mailing of the 10 statutory notices, the Division provided the following with its motion papers: (i) the affirmation, dated March 23, 2022, of Eric R. Gee, Esq., the Division’s representative; (ii) an affidavit, dated March 3, 2022, of Deena Picard, a Data

Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record For Presort Mail – Assessments Receivable" (CMR) postmarked February 17, 2021; (iv) an affidavit, dated March 17, 2022, of Susan Ramundo, a manager in the Division's mail room; (v) copies of notices of estimated determination L-052899109, L-052899110, and L-052899111, and their respective associated mailing cover sheets; (vi) copies of notices of determination L-052899112, L-052899113, L-052899114, L-052899115, L-052899116, L-052899117, and L-052899118, and their respective associated mailing cover sheets; (vii) a copy of petitioner's request for conciliation conference and the fax cover sheet dated June 14, 2021 that confirmed transmittal of three pages to fax number (518) 435-8554 on June 14, 2021 at 5:20 p.m.; (viii) a copy of the conciliation order issued to petitioner on July 16, 2021; and (ix) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2017 (2017 tax return), electronically filed on April 13, 2018.

6. Eric R. Gee, an attorney in the Office of Counsel of the Division, avers in his affirmation that petitioner's 2017 tax return was electronically filed on April 13, 2018, and that this was the last return filed before the Division issued the notices. Mr. Gee affirms that the address appearing on the return corresponds to the address appearing on the notice, except that the notice was addressed to "XXXX Steinway St Apt XX." He asserts that

“[i]n the borough of Queens, the significance of the dash within the address is that it divides the adjoining avenue (here 'XXth') with the house number (here 'XX') on the block. As such, no other address with XXXX or only XX Steinway Street, Long Island City exists.”

Mr. Gee also asserts that when using the United States Postal Service (USPS) website to look up a zip code by address for XX-XX Steinway St., Apt. XX, Long Island City, NY 11101, the result defaults to "XXXX Steinway St., Apt. XX, Long Island City, NY 11101-1531.”

7. A printout of the USPS Zip Code Lookup page on the USPS website is attached to Mr. Gee's affirmation. A review of the USPS Zip Code Lookup for "XX-XX Steinway St., Apt. XX, Long Island City, NY 11101" confirms that the address defaults to "XXXX Steinway St., Apt. XX, Long Island City, NY 11101-1531."

8. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20210401700." 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 "2-17." 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 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.

9. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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."

10. The CMR in the present matter consists of 18, pages and lists 197 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 18, which contains 10 entries. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark, dated February 17, 2021, to each page of the CMR, wrote the number "197" on page 18 next to the preprinted heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed or signed the last page.

11. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0283 4197 and reference number L-052899109 was mailed to petitioner, "ALTAMIRANO-CARMEN R" at "XXXX STEINWAY ST APT XX LONG ISLAND CITY NY 11101-1531." The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and petitioner's name and address as noted.

12. Page 6 of the CMR indicates that notices with certified control numbers 7104 1002 9730 0283 4203, 7104 1002 9730 0283 4210, 7104 1002 9730 0283 4227, 7104 1002 9730 0283 4234, 7104 1002 9730 0283 4241, 7104 1002 9730 0283 4258, 7104 1002 9730 0283 4265, 7104

1002 9730 0283 4272, and 7104 1002 9730 0283 4289 and reference numbers L-052899110, L-052899111, L-052899112, L-052899113, L-052899114, L-052899115, L-052899116, L-052899117 and L-052899118, respectively, were mailed to petitioner, “ALTAMIRANO-CARMEN R” at “XXXX STEINWAY ST APT XX LONG ISLAND CITY NY 11101-1531.” The corresponding mailing cover sheets, attached to the Picard affidavit as part of exhibit “B,” bear these certified control numbers and petitioner’s name and address as noted.

13. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other

Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

14. Each of the 18 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of February 17, 2021. On page 18, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 197 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "197," indicating 197 pieces of mail were received by the USPS. There is a set of initials or signature on page 18.

15. According to both the Picard and Ramundo affidavits, copies of these notices were properly mailed to petitioner on February 17, 2021, as claimed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by noting the Division of Tax Appeals' jurisdiction over the petition, which was timely filed following the issuance of the conciliation order. As such, the Administrative Law Judge found that the Division's motion for summary determination would be the proper method for considering whether petitioner's conciliation conference request was timely filed.

The Administrative Law Judge set forth the standard for considering a motion for summary determination, noting that under our Rules of Practice and Procedure (Rules), the same shall be granted if an administrative law judge finds that no material and triable issue of fact is presented. However, the Administrative Law Judge also found that the proponent of such motion must demonstrate entitlement to summary determination as a matter of law by offering sufficient evidence to eliminate any material issues of fact.

The Administrative Law Judge found that petitioner did not respond to the Division's motion for summary determination. The Administrative Law Judge determined that, under long-

standing caselaw, petitioner's failure to respond to the Division's motion must be deemed to be a concession that no question of fact requiring a hearing exists. Similarly, petitioner presented no evidence to counter the facts alleged in the Division's employees' affidavits; consequently, the Administrative Law Judge deemed those facts admitted as well.

The Administrative Law Judge next set forth the statutory limitations period for protesting a notice of determination, noting that a request for a conciliation conference with BCMS must be filed within 90 days of a mailing of such notice. The Administrative Law Judge described this time limit as strictly enforced, because absent a timely protest, the notice becomes fixed and final, and the Division of Tax Appeals lacks the jurisdiction to consider the merits of the protest. The Administrative Law Judge then set forth the burden of proof allocated to the Division where the timeliness of a request for a conciliation conference is in question. The Administrative Law Judge found that the Division had met its burden by proving the fact and date of mailing the notices here in question through its submission of a properly completed CMR and affidavits of Division employees familiar with the Division's mailing procedures. The Administrative Law Judge also deemed any variations between the addresses inconsequential.

The Administrative Law Judge determined that the Division properly mailed the notices at issue on February 17, 2021, and concluded that petitioner's request for a conciliation conference, filed June 14, 2021, was therefore untimely.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception, as she did below, that she should not be considered liable for the sales tax asserted in the notices of determination issued to her as she was not actively involved in the business that generated the sales giving rise to the sales tax asserted in the notices. She alleges that another person was solely responsible for the sales tax due from those

sales and asks this Tribunal to find her not liable for the assessments of sales tax asserted in the notices here at issue. Petitioner makes no argument regarding whether the Administrative Law Judge correctly determined that the Division was entitled to summary determination on its motion.

The Division argues that the Administrative Law Judge correctly determined that petitioner's request for a conciliation conference was untimely, and thus properly granted its motion for summary determination and asks this Tribunal to affirm that determination. The Division cites Tax Law §§ 1138 and 170 (3-a) for establishing a strict 90-day limitation period to petition the Division of Tax Appeals for a hearing following the issuance of a notice of determination; or, in the alternative, to request a conciliation conference with BCMS if such period has not elapsed. The Division asserts that it has carried its burden of proving proper mailing of the notices issued on February 17, 2021, which then shifts to petitioner the burden of showing that the request for a conciliation conference was timely filed. The Division notes that petitioner did not respond to its motion for summary determination and did not raise any objections to the Division's mailing procedures described in its employees' affidavits in support of its motion.

OPINION

As noted by the Administrative Law Judge, the Division brought a motion to dismiss the petition under section 3000.9 (a) of our Rules, or, in the alternative, a motion for summary determination under section 3000.9 (b) of our Rules (20 NYCRR 3000.9 [a], [b]). The Administrative Law Judge correctly determined that because petitioner filed the petition protesting the conciliation order dismissing her request within 90 days of its issuance, such petition was timely (*see* Tax Law §§ 170 [3-a] [a], [e] and 2006 [4]; *see also Matter of Novar*

TV & Air Conditioner Sales & Serv., Inc., Tax Appeals Tribunal, May 23, 1991). As the Division of Tax Appeals has jurisdiction over the petition, the Division's motion was correctly treated as a motion for summary determination (*id.*)

Under our Rules, 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]). Our Rules also provide that 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]). "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 557, 562 [1980]).

The Division argued in its motion below that petitioner's request for a conciliation conference was filed more than 90 days after the issuance of the notices of determination and was thus untimely (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). If proven, it would leave the Division of Tax Appeals without jurisdiction to consider the substantive merits of the petition, as the assessments of sales tax would have become fixed and final 90 days after issuance of the notices of determination (*id.*; *see also Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Where, as here, the timeliness of a request for a conciliation conference is in question, the Division must show that it has carried its burden of demonstrating the fact and date of the mailing of the statutory notices to petitioner's last known address (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

The Administrative Law Judge correctly determined that because petitioner did not respond to the Division's motion, she is properly deemed to have conceded that no question of fact requiring a hearing exists (*John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]); *Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]). Furthermore, as petitioner has presented no evidence to rebut the facts alleged in the Picard and Ramundo affidavits and supporting documents, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel*, 36 NY2d at 544). Specifically, the CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2011). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2022). The Administrative Law Judge thus correctly determined that petitioner's request for conciliation conference was late filed. Consequently, the assessments of sales tax contained within the notices of determination are fixed and final and the Division of Tax Appeals lacks jurisdiction to reach the substantive merits of petitioner's protest.

We also agree with the Administrative Law Judge that the two variations in petitioner's address as used on the notices of determination (which include four additional digits following petitioner's five-digit zip code and the absence of a hyphen between the first two digits and last two digits of petitioner's street address) sufficiently conform with petitioner's last known address. The Administrative Law Judge correctly deemed these variations inconsequential because these variations would not prevent delivery of the notices of determination to

petitioner's last known address as given on her last tax return (*see Lee v Commr.*, TC Memo 2011-129 [2011]; *see also Matter of Perk*, Tax Appeals Tribunal, December 13, 2001; *Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Carmen R. Altamirano is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Carmen R. Altamirano is denied; and
4. The conciliation order dated July 16, 2021, is sustained.

Dated: Albany, New York
March 23, 2023

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner