

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SAFFORD SERVICES CORP.	:	DECISION
	:	DTA NO. 831241
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, 2018 through May 31, 2021.	:	

Petitioner, Safford Services Corp., filed an exception to the determination of the Administrative Law Judge issued on November 9, 2023. Petitioner appeared by its owner/president, Justin Safford. The Division of Taxation appeared by Amanda Hiller, Esq. (Kaitlyn Smith, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on January 29, 2024, the date that petitioner's letter brief in reply was received.

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

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

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

1. The Division of Taxation (Division) issued to petitioner, Safford Service Corp., a notice of determination, bearing assessment number L-056438812, dated July 1, 2022, for the period June 1, 2018 through May 31, 2021 (notice). The notice was issued to petitioner at an address in Ripley, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0595 7428.

2. On October 24, 2022, petitioner filed a petition with the Division of Tax Appeals in protest of the notice. The envelope, containing the petition, bears the United States Postal Service (USPS) Priority Mail Express 1-Day postmark of October 24, 2022. Petitioner's address listed on the petition is the same Ripley, New York, address as listed on the notice.

3. On June 2, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the notice was issued on July 1, 2022, but the petition was not filed until October 24, 2022, or in excess of 90 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents: (i) an affirmation, dated July 28, 2023, of Kaitlyn Smith, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated July 11, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort

Mail – Assessments Receivable” (CMR) postmarked July 1, 2022; (iv) an affidavit, dated July 11, 2023, of Susan Ramundo, a manager in the Division’s mail room; (v) a copy of the notice of determination, dated July 1, 2022, together with the associated mailing cover sheet; and (vi) a copy of petitioner’s electronically filed form IFTA – 100, IFTA Quarterly Fuel Use Tax Return for the period July 1, 2021 through September 30, 2021 (IFTA quarterly fuel use tax return), filed on June 27, 2022. The address listed on the IFTA quarterly fuel use return is the same address as listed on both the petition and the notice and was the last known address for petitioner at the time the notice was issued.

5. The affidavit of Marianna Denier sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Denier has been Director of MAPS since July 2022 and a Principal Administrative Analyst since August 2022. She was a Supervisor of Administrative Analysis from July 2019 through August 2022. Ms. Denier began working for the Division in February 1986 and has been a supervisor in MAPS since October 2004. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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. 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 “20221751700.” 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 “07/01/22.” In addition, as described by Ms. Denier, 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.

6. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. 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.”

7. The CMR in the present matter consists of 19 pages and lists 198 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 19, which contains zero entries. Ms. Denier 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 July 1, 2022, to each page of the CMR, wrote “198” on page 19 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and signed or initialed the last page of the CMR.

8. Page 17 of the CMR indicates that a notice with certified control number 7104 1002 9730 0595 7428, and reference number L-056438812 was mailed to “SAFFORD SERVICE CORP” at the Ripley, New York, address listed on the notice. The corresponding mailing cover

sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Susan Ramundo, a manager in the Division’s mail room since 2017 and currently an Associate Administrative Analyst, whose duties include the management of the mail room staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals, and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained 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 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. As noted, each page of the CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark dated July 1, 2022. In addition, she attests that the USPS employee’s initials, or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s

initials or signature indicates that all 198 articles of mail listed on the CMR, including the article addressed to petitioner, was received by the USPS for mailing on July 1, 2022.

10. According to the Denier and Ramundo affidavits, the notice was mailed to petitioner on July 1, 2022, as claimed.

11. In response to the notice of intent to dismiss petition, petitioner's owner/president, Justin Safford, submitted a letter, along with documentation pertinent to the underlying merits of this matter. In his letter, Mr. Safford claims, among other things, that the notice of determination was not received or seen by him.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by noting that Tax Law § 1138 authorizes the Division to issue a notice of determination for additional tax or penalties under articles 28 and 29 of the Tax Law. The Administrative Law Judge observed that there is a 90-day statutory limit to file a petition with the Division of Tax Appeals or a request for a Bureau of Conciliation and Mediation Services (BCMS) conference following the Division's issuance of a notice of determination.

The Administrative Law Judge next observed that where the timeliness of a taxpayer's protest of a notice is in question, the Division bears the burden of demonstrating the fact and date of mailing of the notice to petitioner's last known address using certified or registered mail. According to the Administrative Law Judge, the Division must establish its standard mailing procedure and that such procedure was followed in this particular case to meet this burden. The Administrative Law Judge concluded that the Division met its burden and established that the subject notice of determination was properly mailed to petitioner on July 1, 2022.

The Administrative Law Judge observed that a properly mailed statutory notice gives rise to a presumption of receipt and a petitioner bears the burden of rebutting that presumption. The Administrative Law Judge found that petitioner here did not contest that the Division properly mailed the notice to its address but, rather, claimed that the notice was not received or seen by its owner and president. The Administrative Law Judge determined that mere denial of receipt of the notice, without more, is insufficient to overcome the presumption of receipt. The Administrative Law Judge found that the petition in the present matter was filed beyond the 90-day limitations period. Accordingly, the Administrative Law Judge dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner continues to assert on exception that due to the failure of its administrative office staff, petitioner's owner and president did not see or receive the July 1, 2022, notice of determination within the statutory period to file a timely protest. Petitioner does not challenge the Division's mailing.

The Division contends that the evidence submitted in response to the notice of intent establishes proper mailing of the notice of determination to petitioner's last known address on July 1, 2022, and that the petition was untimely filed. As such, the Division argues that the Tribunal is without jurisdiction to consider the substantive merits of the petition and that it was properly dismissed by the Administrative Law Judge. The Division further contends that the additional documentation submitted by petitioner with its exception should not be considered by the Tribunal as it was not submitted to the Division of Tax Appeals and was not included within the Administrative Law Judge's record.

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 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, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). "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, 382 [2d Dept 1960]). 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 [1st Dept 1992], citing *Zuckerman*).

The Division issues a notice of determination of sales and compensating use taxes to the person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (*see* Tax Law §§ 1138 [a] [1]; 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 may rely on the address listed on the last return filed with the Division as the last known address (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

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 the mailing of the notice, with certain exceptions not relevant here (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may challenge 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]). Absent such a timely filed protest, a notice of determination becomes an assessment subject to collection (Tax Law § 1138 [a] [1]). The 90-day statutory time limit for the filing of a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [where a petition filed one day late was dismissed]). This is because the Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (Tax Law § 1138 [a] [1]; *Matter of Garitta*).

Where, as here, the timeliness of a taxpayer’s petition is in question, we must first examine 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). 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., LLC*, Tax Appeals Tribunal, March 3, 2011).

We find that the Division has met its burden here. The affidavits of Marianna Denier and Susan Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue, establish the Division's standard mailing procedures. We also find that the CMR has been properly completed and serves as documentary proof that the Division mailed the notice 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 to petitioner (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Specifically, the 19-page CMR lists the certified mail control number corresponding to each notice's cover sheet, petitioner's name and address, an assessment ID corresponding to each notice, a dated postmark and the initials of the postal employee accepting the articles of mail listed on the CMR. According to the CMR, there was a total of 198 items delivered into the possession of the USPS on July 1, 2022, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote "198" on the last page and initialed the page. Additionally, the address listed for petitioner on the mailing cover sheet and CMR entry is the same as the address listed on petitioner's last filed quarterly fuel use tax return (IFTA-100) filed on June 27, 2022. This was the last return filed by

petitioner before the issuance of the subject notice and, thus, the notice was properly addressed to petitioner at its last known address (*see* Tax Law § 1138 [a] [1], 1147 [a] [1]).

Based on the foregoing documentary proof, we agree with the determination of the Administrative Law Judge that the Division demonstrated proper mailing of the notice to petitioner on July 1, 2022, which absent contrary evidence, raises a presumption of receipt by petitioner (*see* Tax Law § 1147 [a] [1]; *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]; *Matter of Kayumi*, Tax Appeals Tribunal, June 27, 2019). Petitioner is entitled to rebut that presumption by demonstrating that the standard mailing procedure was not followed or that the procedure was performed so carelessly that it would be unreasonable to assume that the notice was mailed (*see Matter of T.J. Gulf, Inc. v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]). Testimony that amounts to no more than a mere denial of receipt is insufficient to rebut the presumption of receipt (*id.*). Further, unsubstantiated allegations or assertions are insufficient to raise an issue of fact in response to a motion for summary determination and, in this case, a notice of intent to dismiss (*see Zuckerman v City of New York*, citing *Alvord v Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]; *American Cars 'R' Us, Inc. v Chu*, 147 AD2d 797, 799 [3d Dept 1989]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011).

In response to the Supervising Administrative Law Judge's notice of intent to dismiss, petitioner submitted a letter in which petitioner admitted that its petition was filed after the 90-day statutory limitations period had expired. Further, petitioner submitted certain documents that did not address the timeliness of its petition. Petitioner did not challenge the Division's mailing or that petitioner received the notice. Instead, below and on exception, petitioner argues that its owner and president did not receive or see the notice, and was not made aware of the notice, due

to the failure of its administrative office staff. As noted above, the deadline for filing a petition is strictly enforced. Denials of receipt without more are insufficient to overcome the presumption of receipt (*see Matter of T.J. Gulf, Inc. v New York State Tax Commn.*). Further, extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see Matter of Leibowitz*, Tax Appeals Tribunal, April 13, 2015). This is because the Division of Tax Appeals and this Tribunal are without jurisdiction to consider the merits of such a petition (*see Matter of Garitta*). As the petition filed on October 24, 2022 was untimely, it was properly dismissed by the Administrative Law Judge.

Finally, petitioner presented documents with his exception that were not a part of the proceeding below. Consistent with “our longstanding policy against considering evidence that was not made part of the record below,” we do not accept into the record those documents (*see Matter of Mola Sacko*, Tax Appeals Tribunal, June 7, 2018; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Safford Services Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Safford Services Corp. is dismissed.

DATED: Albany, New York
July 25, 2024

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

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

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner