

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AZIZ KHAN : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 825293
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2005 through February 28, 2007. :

Petitioner, Aziz Khan, filed a petition 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, 2005 through February 28, 2007.

On November 29, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 14, 2013, Administrative Law Judge Joseph W. Pinto, Jr., issued an Order withdrawing the Notice of Intent with respect to assessment number L-030504127-1.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), brought a motion on May 31, 2013 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, Esq., dated May 31, 2013, and annexed exhibits. Although petitioner, appearing pro se, had until July 1, 2013 to respond, no response was filed. Thus, July 1, 2013 commenced the 90-day period for issuance of this determination. Based upon the motion papers, affidavit

and exhibits submitted therewith, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On October 12, 2012, petitioner, Aziz Khan, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review assessment number L-030504127-1, which was attached to the petition. The instant motion challenges the timely filing of the petition in response to that notice.

2. Assessment number L-030504127-1 related to a Notice of Determination, dated August 7, 2008, and was addressed to petitioner at a Dix Hills, New York, address.

3. On November 29, 2012, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of a Notice of Determination issued to petitioner on August 7, 2008 and that the petition was not filed until October 12, 2012. After further proceedings and consideration by the undersigned, the Notice was withdrawn by an Order, dated March 14, 2013, and the Division of Taxation was directed to file an answer to the petition within 75 days. Said answer was filed on May 8, 2013. This motion for summary determination was filed on May 31, 2013.

4. In support of the motion and to prove proper and timely mailing of the Notice of Determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit of Daniel A. Maney, dated May 29, 2013, a manager in the Division's Refunds,

Deposits, Overpayments and Control Units, which included the Case and Resource Tracking System (CARTS) Control Unit, with knowledge of both past and present office procedures relating to statutory notices; (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated August 7, 2008; (iii) an affidavit, dated May 30, 2013, of Bruce Peltier, the current Principal Mail and Supply Supervisor, who has served as a mail room supervisor since March, 1999; and (iv) a copy of petitioner’s jointly filed 2003, 2008, and 2010 New York resident income tax returns, each of which reported the same Dix Hills, New York, address for petitioner as that listed on the subject Notice of Determination and that listed on the petition.

5. The affidavit of Daniel A. Maney sets forth the Division’s general practice and procedure for processing statutory notices prior to shipment to the mail processing center. Mr. Maney averred that he held this position since January 2010 and is fully knowledgeable of past and present procedures for processing notices, which have not changed since 1992. He stated that he receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date of such production is listed on each page of the CMR. Following the Division’s general practice, the actual date of mailing is handwritten on the first page of the CMR. In the present case “8-7-08” was handwritten on the first page. It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

6. 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 P.O. Address."

7. The CMR relevant to the Notice of Determination under protest consisted of 45 pages and listed 491 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney noted that portions of the CMR that were attached to his affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee affixed a USPS postmark to each page of the CMR and also wrote his or her initials on each page thereof. The postmarks indicated a date of "Aug-7 2008."

8. Page 24 of the CMR indicated that a Notice of Determination, assigned certified control number 7104 1002 9730 0787 5133 and assessment number L-030504127, was mailed to petitioner at the Dix Hills, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor in the Division's Mail Processing Center (Center), described the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The mailing cover sheet preceded each notice. A staff member retrieved the notices and mailing cover sheets and operated a machine that put each

notice and mailing cover sheet into a windowed envelope. Staff members then weighed, sealed and placed postage on each envelope. The envelopes were counted and the names and certified control numbers verified against the CMR. A staff member then delivered the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee would then affix a postmark and also place his or her signature or initials on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contained the postal service employee's initials and a postmark. The Center further requested that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS employee complied with this request by circling the number "491" on the last page and placing his or her initials on the page.

10. According to both the Maney and Peltier affidavits, based upon the office protocols for properly issuing a notice of determination and their belief that these protocols were followed herein, a copy of the subject Notice of Determination was mailed to petitioner on August 7, 2008, as claimed.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [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, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [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, 206 NYS2d 879 [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, 448-449, 582 NYS2d 170, 173 [1992] citing *Zuckerman*).

C. There is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a Notice of Determination (Tax Law § 1138[a][1]). In most cases where the timeliness of the protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 1138[a][1]). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). There must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and there must be proof that the standard procedure was followed in this particular instance (*see Matter of*

Katz; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

E. The Division has also presented sufficient documentary proof in the form of the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on August 7, 2008. The CMR listed certified control numbers with corresponding names and addresses and bore USPS postmarks on each page, dated August 7, 2008. Additionally, a postal employee circled “491” on the last page of the CMR with his initials to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus 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, 2001).

F. The Division has thus established proper mailing of the subject Notice of Determination (*see Matter of Accardo*). Accordingly, “a presumption arises that the notice was delivered or offered for delivery . . . in the normal course of the mail” (*Matter of Katz, Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). While petitioner has the right to rebut this presumption, such rebuttal must consist of more than simply the denial of receipt (*see Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011).
Petitioner, not appearing on this motion, presented no rebuttal evidence.

G. Pursuant to the foregoing discussion, there are no material issues of fact present in this matter and dismissal of the petition is required. Specifically, the record establishes that the subject Notice of Determination was issued on August 7, 2008, and that the petition was filed on October 12, 2012, a date beyond the 90-day period of limitations. The petition was thus untimely filed and, accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The petition of Aziz Khan is hereby dismissed.

DATED:Albany, New York
September 26, 2013

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE