

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SYOSSET EATERY, INC. : DETERMINATION
 : DTA NO. 826045
 :
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 December 1, 2009 through November 30, 2012. :
:

Petitioner, Syosset Eatery, Inc., 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 December 1, 2009 through November 30, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), brought a motion dated May 28, 2014 seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Mihe Kim, CPA, did not respond to the Division of Taxation's motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

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

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination, bearing audit case ID number X-271727217, dated February 27, 2013. The notice is addressed to petitioner, Syosset Eatery, Inc., at an address in Syosset, New York.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the February 27, 2013 Notice of Determination. The request was mailed to BCMS on November 25, 2013.

3. On December 20, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice of determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on February 27, 2013, but the request was not received until December 3, 2013, or in excess of 90 days, the request is late filed.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on January 13, 2014.

5. To show proof of proper mailing of the February 27, 2013 Notice of Determination, the Division provided the following with its motion papers: i) an affidavit, dated May 21, 2014, of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) pages numbered 1, 212, and 287 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), each legibly postmarked February 27, 2013; (iii) an affidavit, dated May 21, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center;

(iv) an affidavit, dated May 22, 2014, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated March 28, 2014; (vi) a copy of the February 27, 2013 Notice of Determination with the associated mailing cover sheet; and (vii) petitioner's request for conciliation conference, mailed November 25, 2013, which lists the same address for petitioner as that listed on the subject notice.

6. The affidavit of Daniel A. Maney, who has been in his current position since January 2010, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 pages of the CMR in the present case to the actual mailing date of "2/27/13." In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. According to Mr. Maney, 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. According to the Maney affidavit, the CMR in the present matter consists of 287 pages. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 287. Mr. Maney adds that the total number of statutory notices mailed pursuant to the CMR was 3,156.

9. Attached to the Maney affidavit, as exhibit "A," is a copy of pages 1, 212, and 287 of the CMR issued by the Division on February 27, 2013. Pages 1 and 287 have a handwritten entry referring to February 27, 2013 on the top; however, page 212 does not have a similar entry.

10. Page 212 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1506 7728 and reference number X 271727217 was mailed to petitioner at the Syosset, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

11. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier 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. Staff members then weigh, seal and place postage on each envelope.

The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. The Center 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.

12. Each of the three pages of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of February 27, 2013. On page 287, corresponding to "Total Pieces and Amounts," the USPS employee circled the preprinted number 3,156, wrote his or her initials or a signature, and affixed a postmark. According to Mr. Peltier, the affixation of the postmarks and the Postal Service employee's initials indicate that all 3,156 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on February 27, 2013.

13. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on February 27, 2013, as claimed.

14. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 1506 7728. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9730 1506 7728 and addressed to petitioner was delivered to an address in Syosset, New York, on March 1, 2013. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number

7104 1002 9730 1506 7728. Exhibit “B” attached to the Corina affidavit is the USPS response to the Division’s request. The response for article number 7104 1002 9730 1506 7728 indicates delivery of the same article on March 1, 2013 to an address in Syosset, New York, and identifies the recipient as “Chin Chul Choi” and bears a copy of his signature in that capacity. This signature matches the signature of Chin Chul Choi, president of petitioner, as contained on the petition filed in this matter.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner’s request for conciliation conference. This determination shall address the instant motion as such.

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 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 [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. Vil. of Patchogue Fire Dept.*, 146 AD2d 573 [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]). “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] *citing Zuckerman*).

C. 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 date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, 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 to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

E. Here, the Maney and Peltier affidavits establish the Division's current standard mailing procedure. In this case, however, the Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notice. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Exhibit "A" of the Maney affidavit contains three pages of what purports to be a longer multi-page computer-generated CMR. Unlike in the procedure described in the Maney affidavit, the three pages in exhibit "A" are not physically connected, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 287 has been changed to February 27, 2013, but remains unchanged on page 212. Pages 1 and 287, therefore, bear a different date than page 212. As a result, the partial CMR submitted as exhibit "A" of the Maney affidavit also does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Additionally, the Division has not presented evidence of petitioner's last known address prior to the date the subject notice was issued, in order to meet its burden of proving that the notice was mailed to petitioner's last known address.

F. These flaws may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the Corina affidavit and the accompanying USPS delivery information clearly and convincingly show that a copy of the subject notice, addressed to petitioner, which was also listed on the CMR, was delivered to petitioner at its Syosset, New York, address on March 1, 2013. The signature provided by the USPS indicates that petitioner's president signed for the document as recipient, and petitioner has offered no evidence to the contrary. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that the subject notice was properly delivered to petitioner and received on March 1, 2013 (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, June 10, 2010).

G. Based on the above conclusions, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., March 1, 2013, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *rev'd* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Petitioner's request for conciliation conference was not filed until November 25, 2013. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's

request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). As a matter of law, Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006; *Matter of Sak Smoke Shop*).

H. The Division's motion for summary determination is hereby granted, the December 20, 2013 order dismissing petitioner's request is sustained and the petition is denied.

DATED: Albany, New York
September 25, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE