

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GAETANO MODICA : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 826119
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period December 1, 2008 :
through November 30, 2011. :
:

Petitioner, Gaetano Modica, 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, 2008 through November 30, 2011.

On May 22, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion seeking an order dismissing the petition or, in the alternative, summary determination of the proceeding pursuant to sections 3000.5, 3000.9(a)(i), and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA), filed a response to the Division of Taxation's motion on June 18, 2014. Accordingly, the 90-day period for the issuance of this determination began on June 18, 2014. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition 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 dated January 16, 2013 with assessment

number L-039004312. The notice is addressed to petitioner, Gaetano Modica, at “1837 CHANNEL RD, BROAD CHANNEL, NY 11693-1233.” It assesses sales and use taxes for the period December 1, 2008 through November 30, 2011 in the amount of \$72,543.83 plus interest and penalty. The notice explains that petitioner must file a request for a conciliation conference or a petition for a Tax Appeals hearing by April 16, 2013.

2. Petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was postmarked November 19, 2013 and received by BCMS on November 25, 2013.

3. On December 13, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner’s protest of the subject notice 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 January 16, 2013, but the request was not received until November 25, 2013, or in excess of 90 days, the request is late filed.

4. Petitioner filed a petition challenging the dismissal on February 27, 2013. In it, petitioner stated that the notice was not sent to petitioner’s last known address and that petitioner never received a copy of the notice.

5. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) the petition of Gaetano Modica, dated February 27, 2013; (ii) an affidavit, dated May 15, 2014, of Daniel A. Maney, Manager of the Division’s Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked January 16, 2013; (iv) an affidavit, dated May 16, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (v) a copy of petitioner’s resident income tax return (IT-201) for the year 2011.

6. The affidavit of Daniel A. Maney 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 CSM is printed 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 page of the CMR, in the upper right corner, to the actual mailing date of "1/16/13." In addition, the pages of the CMR are banded together when the documents are delivered to USPS and stay banded unless ordered by Mr. Maney. The page numbers of the CMR run consecutively, beginning with "PAGE: 1," and are noted in the upper right corner of each page.

7. Each notice is assigned a certified control number that appears on a separate one-page mailing cover sheet. The mailing cover sheet also bears a bar code, the taxpayer's mailing address, the Division return address on the front and the taxpayer assistance information on the back. In addition, the certified control number is listed on the CMR under the heading "Certified No." The assessment numbers are listed under the heading "Reference No," while the names and addresses of the recipients are listed under "Name of Addressee, Street and P.O. Address."

8. The CMR contains 17 pages and lists 183 certified control numbers. The entire CMR is attached to Mr. Maney's affidavit, and portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark to each page of the CMR and signed or initialed the last page.

9. Page 13 of the CMR indicates that a Notice of Determination with a certified control number 7104 1002 9730 1445 5670 and assessment number L-039004312 was sent to "Modica Gaetano, 1837 Channel RD, Broad Channel, NY 11693." The corresponding mailing cover sheet bears the same certified control number and petitioner's name and address.

10. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's

(Center) general operations and procedures. The Center receives the notices in an area designated for “Outgoing Certified Mail.” A staff member operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Then the staff members weigh, seal and place postage on each envelope. The first and last pieces 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 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 signature or initials on the CMR, indicating receipt by the post office. The Center 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. Here, each page of the CMR contains a USPS postmark of January 16, 2013 and on page 17, the USPS employee circled and initialed next to the preprinted number 183.

11. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on January 16, 2013 as claimed.

12. The resident income tax return for the year 2011, bearing the same address shown on the notice and the CMR, was filed on March 21, 2012. This was the last return filed before the notice was issued.

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). Since the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination under section 3000.9 of the Rules is the proper vehicle to consider the timeliness of petitioner’s request for conciliation conference. Given the timely petition, the Division’s motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

B. 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 fact is presented” (20 NYCRR 3000.9[b][1]).

C. A motion for summary determination is subjected to the same provision as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9[c]). “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 issue of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). 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 Fire Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Dept.*, 146 AD2d 572, 573 [2d Dept 1989]). A case should not be decided on a motion but warrants a full trial, if material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts (*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 v City of New York*, 49 NY2d 557, 562 [1980]).

D. Tax Law § 1138(a)(1) requires a taxpayer to file a petition in protest a notice of determination with the Division of Tax Appeals within 90 days from the date of mailing of the notice. Alternatively, a taxpayer can file a request for conciliation conference with the Bureau of Conciliation and Mediation services to protest of a notice of determination if it was filed within the 90-day statutory time limit (Tax Law § 170[3-a][a]). The Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case if the petitioner fails to file within the statutory time limit, even by one day (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petition or Request for Conciliation Conference is at issue, the Division must fulfill its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law §§ 1138[a][1]; 1147[a][1]; *see Matter of Katz*, Tax Appeal Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeal Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on January 16, 2013. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and the fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR, thereby establishing that the general mailing procedure was followed in this instance (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and the CMR conforms with the address listed on petitioner's resident income tax return (Form IT-201) for the year 2011, which satisfies the "last known address" requirement in Tax Law § 1138(a)(1). Thus the Division properly mailed the notice to petitioner on January 16, 2013. Therefore, the 90-day statutory limit to file a petition with the Division of Tax Appeals or a Request for Conciliation Conference with BCMS commenced on that date (Tax Law §§ 170[3-a][a]; 1138[a][1]).

G. In response to the Division's motion, petitioner's representative submitted an affidavit, that states that petitioner did not receive the Notice of Determination and that the petitioner only became aware of the notice by a result of the Division's collection efforts and a request made by petitioner's representative. Petitioner also contends that the Division never mailed the Notice of Determination to petitioner's last known address. Whether petitioner's

argument is successful depends upon whether the Division can demonstrate that the notice was properly mailed (*see Matter of Blau Par Corporation*, Tax Appeals Tribunal, May 21, 1992). The demonstration of proper mailing leads to the conclusion that the request for a conference was untimely (Tax Law § 1138[a][1]). As set forth above, the Division's evidence is sufficient to support its assertion that the notice was properly mailed, and the claim that the petitioner did not receive the notice is not sufficient to rebut the Division's evidence of mailing (Tax Law § 1147[a][1]; *see Matter of America Cars 'R' Us v Chu*, 147 AD2d 797 [3d Dept 1989]).

H. Petitioner also argues that the postal employee did not write in the number of pieces of mail but only circled the number on the CMR. This argument has no merit since the Peltier affidavit makes clear that either method comports with Division policy.

I. Petitioner had 90 days from the issuance of the Notice of Determination to file either a request for a conciliation conference with the BCMS or file a petition with the Division of Tax Appeals. However, petitioner did not file request for conciliation conference until November 19, 2013, or 307 days later. Therefore, petitioner's request is untimely and the Division of Tax Appeals is without jurisdiction to hear the merits (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

J. The Division's motion for summary determination is granted, and the petition of Gaetano Modica is dismissed.

DATED: Albany, New York
September 11, 2014

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE