

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
EL TRINITARIO GROCERY CORP.
for Revision of a Determination or for Refund
of Cigarette Tax under Article 20 of the Tax Law
for the Period Ended June 21, 2011.

DETERMINATION
DTA NO. 826125

Petitioner, El Trinitario Grocery Corp., filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended June 21, 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osa Iyinbo, Esq., of counsel), brought a motion dated September 12, 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)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by its president, Rina Rosario, had until October 13, 2014 to respond to the Division of Taxation's motion, but did not do so, and it is this October 13, 2014 date that commences the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Dennis M. Galliher, 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. Petitioner, El Trinitario Grocery Corp., filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The Request was filed in protest of a Notice of Determination dated October 19, 2011, bearing assessment number L-036748547-9, and assessing a penalty in the amount of \$2,000.00. The notice states that the penalty was imposed upon the following basis:

“During an inspection of your premises on 6/21/11, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarette and/or tobacco products.”

The Request is dated as signed on December 17, 2013, and is date stamped as received by BCMS on December 23, 2013.

2. On January 10, 2014, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Bearing CMS No. 260183 and referencing notice number L-036748547, the Order determined that petitioner’s protest 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 was issued on October 19, 2011, but the request was not mailed until December 18, 2013, or in excess of 90 days, the request is late filed.”¹

3. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on February 19, 2014, and the envelope in which the petition was mailed bears a Pitney Bowes machine metered postmark dated February

¹ The Order states that the Request was mailed on December 18, 2013. In contrast, the affidavit of Osa Iyinbo states that the Request was filed one day earlier on December 17, 2013 (i.e., the date on which the Request was signed). Given that either of such dates falls more than 90 days after the alleged October 19, 2011 date of issuance of the Notice of Determination, this one day difference is of no moment in determining the timeliness of the Request (*see* Conclusions of Law F and G).

20, 2014. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on February 24, 2014. There is no dispute that the petition was filed within 90 days after the January 10, 2014 issuance of the Order, and constitutes a timely challenge thereto.

4. 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) an affidavit, dated September 12, 2014, of Osa Iyinbo, Esq.; (ii) an affidavit, dated September 2, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated September 3, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR) postmarked October 19, 2011; and (v) a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return (Form ST-100) for the quarterly period spanning March 1, 2009 through May 31, 2009, reporting thereon the same Bronx, New York, address for petitioner as is listed on the Notice of Determination at issue herein.

5. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the Notice of Determination at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one page "Mailing Cover Sheet" generated for each such notice,

and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

6. The CARTS generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading, entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading, entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the individual CMRs printed as part of a given print run are listed consecutively (i.e., Page: 1, Page: 2, etc.), and appear at the upper right corner of each page of the individual CMRs printed as part of that print run.

7. Each statutory notice is, as noted, predated with the anticipated date of its mailing. In contrast, each page of a CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing, in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this

preprinted date, identified as the “run,” is to be manually changed by personnel in the Division’s mail room to reflect that the preprinted date on the CMR conforms to the actual date when the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date). Appearing below the entries set forth on the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the heading “Total Pieces Received At Post Office.” Finally, appearing at the bottom left corner of the CMR is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas.”

8. Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for “Outgoing Certified Mail.” 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, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then manually checks the pieces of certified mail listed on the CMR against the information contained on the CMR. In turn, a member of the Center staff will deliver the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing.

9. The Division requests the receiving USPS employee to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The Division further requests that the USPS employee either circle the preprinted total number of pieces received, or indicate the total number of pieces received by writing the number on the CMR. The CMR is the Division's record of receipt by the USPS for pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR would be picked up at the post office by a staff member on the following day after its initial delivery and then delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on October 19, 2011, including that addressed to petitioner herein, consists of one page. All of the notices set forth on this one-page CMR were targeted for manual review (as opposed to "pre-sort" notices that are subject to random review). Under such circumstances, each unit within the Division that has notices selected for manual review receives a separate and complete CMR for such manual review notices. In this case, the notices selected for manual review by the "Audit Div - Desk Audit FACCTS Cig/Tobacco" unit were printed on Page 3 of the run, and the CMR for these notices indicates "Non-Presort Manual Mail" in its title (*see* Finding of Fact 4) so that the certified mail items listed thereon could be pulled for manual review prior to mailing. As a consequence, the CMR for these particular notices, including the notice to be issued to petitioner, is identified in its upper right corner as Page 3.

11. The one-page CMR in this case lists eight certified control numbers along with corresponding assessment numbers, names and addresses.² A USPS employee has affixed the USPS postmark of the Colonie Center USPS branch office, dated October 19, 2011 to the one-page CMR, and also wrote his or her initials on the CMR. The USPS employee has also complied with the Division's request to indicate the number of pieces of mail received at the Post Office by circling the preprinted number "8" appearing next to the heading "Total Pieces and Amounts." In the upper left corner of the of the CMR, the date "10/19/11" has been handwritten, in accordance with the Division's general procedure to indicate conformity of the preprinted run date with the actual date of mailing of the notices set forth on the CMR.

12. The one-page CMR in this case indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0853 4671 and assessment number L-036748547, was to be mailed to petitioner at the Bronx, New York, address referenced above (*see* Finding of Fact 4). The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

13. The facts set forth above in Findings of Fact 5 through 11 were, as noted, established through the affidavits of Mary Ellen Nagengast and Bruce Peltier, as well as the documentary evidence presented by the Division. Ms. Nagengast's affidavit avers that she is and was fully familiar with the Division's present and past office procedures concerning the generation and processing of notices of deficiency for shipment to the Division's Mail Processing Center. Mr. Peltier's affidavit avers that he has been a supervisor in the Division's

² Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

mail room since 1999 and that he is currently a principal mail and supply supervisor and is fully familiar with the operations and procedures of the mailing of notices such as that at issue herein.

14. The record herein includes a copy of the Notice of Determination allegedly mailed by certified mail to petitioner on October 19, 2011, as described, as well as the Request dated December 17, 2013 and the petition filed herein on February 24, 2014. In each instance, as well as on Form ST-100, the same Bronx, New York, address is consistently listed for petitioner, and there is no claim or indication of any change of such address.³

CONCLUSIONS OF LAW

A. 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 timely filed (*see* Finding of Fact 3), 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 order shall address the instant motion as such. Given the timely petition, the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

³ The Request and the petition in this matter bear the signature of petitioner's president, Rina Rosario. The petition included a Power of Attorney form, signed by Rina Rosario and purporting to appoint one Hector M. Tirado as petitioner's representative herein. Review of the Declaration of Representative attached thereto and signed by Mr. Tirado reveals that he is not among those individuals authorized under the Tax Appeals Tribunal's Rules of Practice and Procedure to represent petitioners before the Division of Tax Appeals (*see* 20 NYCRR 3000.2). Petitioner was advised of this by a letter dated April 24, 2014. There is nothing in the record to show that petitioner authorized any other representative in addition to its president, Rina Rosario, to appear on its behalf in place of Mr. Tirado.

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

C. 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 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 [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*). As detailed hereafter, there are no material or triable issues of fact presented and the Division is entitled to summary determination in its favor.

D. 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 mailing of such notice (Tax Law §

478). Alternatively, a taxpayer may contest a notice of determination 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]). 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).

E. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the statutory document being challenged (i.e., the Notice of Determination dated October 19, 2011), by certified or registered mail, to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals 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 October 19, 2011. 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, 2001).⁴ 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 DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address has been the same on all of the relevant documents, and is the same as that listed on petitioner's Sales and Use Tax Return (Form ST-100). This satisfies the "last known address" requirement, and there is no allegation or evidence that petitioner at any time or in any manner informed the Division of a change of such address. The Notice of Determination at issue was thus properly mailed to petitioner on October 19, 2011, and it was incumbent upon petitioner to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter.

G. The documents in the record establish that petitioner's Request was filed, at the earliest, on December 17, 2013 (*see* Finding of Fact 2), and this date falls beyond the 90-day

⁴ The CMR in this instance, though identified as "Page 3," is itself a stand-alone CMR for the eight pieces of certified mail set forth thereon (*see* Finding of Fact 10). As described, it carries all of the identifiers by which the Division, through completion of its ordinary and usual course of effecting mailing, establishes delivery of the items set forth on the CMR into the custody of the USPS (i.e., effects proper mailing of the statutory notices as required). This instance, involving a print run of notices targeted for manual review, differs from the more typical circumstances of a print run of notices targeted for random review (a "pre-sort" run). In the latter circumstances, a CMR typically consists of multiple pages, with each CMR page identified consecutively thereon, and where the final page of the CMR carries the described identifiers by which the Division establishes delivery to the USPS (*see e.g. Matter of Rakusin*). In these latter instances, the Tribunal has held that each page of the multiple page CMR must be presented for review in order to establish the Division's compliance with its standard mailing procedures (*id.*). Here, however, the evidence provided establishes that the CMR, identified as Page 3, is a separate one-page CMR and, as completed, fulfills the requirements of establishing delivery of the Notice of Determination addressed to petitioner into the custody of the USPS, as claimed.

period. Consequently, the Request was untimely and the same was properly dismissed by the January 10, 2014 Order issued by BCMS. Petitioner did not respond to the subject motion, and has offered no claim or evidence to meet its burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

H. The Division's motion for summary determination is hereby granted, the January 10, 2014 Order dismissing petitioner's Request is sustained and the petition is denied.

DATED: Albany, New York
January 8, 2015

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE