

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MASAHIKO NEGITA	:	DETERMINATION
for Revision of a Determination or for Refund of Sales	:	DTA NO. 826337
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 2008 through August 31,	:	
2009.	:	

Petitioner, Masahiko Negita, 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 September 1, 2008 through August 31, 2009.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Lukina, Esq., of counsel), brought a motion dated October 16, 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 Paul P. Andris, 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, Joseph W. Pinto, Jr., 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, Masahiko Negita, 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 September 7, 2011, bearing assessment number L-036602975-5 and asserting tax due of \$186,098.99 plus penalty and interest for the period September 1, 2008 through August 31, 2009. The Request was date stamped as received by BCMS on February 27, 2014.

2. On March 14, 2014, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Referencing notice number L-036602975, 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(s) was issued on September 7, 2011, but the request was not mailed until February 25, 2014, or in excess of 90 days, the request is late filed.”

3. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner on June 4, 2014, and the envelope in which the petition was mailed bears a USPS postmark dated June 6, 2014. The envelope and petition in turn are date stamped as received by the Division of Tax Appeals on June 12, 2014. There is no dispute that the petition was filed within 90 days after the March 14, 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 October 16, 2014, of Anita K. Lukina, Esq.; (ii) an affidavit, dated October 10, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management

Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated October 15, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 7, 2011; and (v) a copy of petitioner's New York State Nonresident and Part-Year Income Tax Return for the year 2010, the last return filed by petitioner before the issuance of the Notice of Determination dated September 7, 2011, reporting the same address for petitioner as that listed on said notice, the request for BCMS conference and the petition.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and 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. Statutory notices are generated from CARTS and are predicated 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 page of the CMR in the present case to the actual mailing date of "9/7/11." In addition, as described by Ms. Nagengast, 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 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. 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 "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 consists of 923 pages and lists 10,148 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 923, which contains 6 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated September 7, 2011 to each page of the CMR and also wrote his or her initials on the last page thereof.

8. Page 14 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0791 8816 and assessment number L-036602975, was to be mailed to petitioner at a New Milford, New Jersey, 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 describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The 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. That staff member then weighs, seals and places 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 signature or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 923 and affixed a postmark dated September 7, 2011 to each page of the CMR. 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 last page of the CMR. Here, the USPS employee complied with this request by circling the number "10,148" on the last page next to the heading "Total Pieces Received at Post Office."

10. According to the Peltier affidavit, a copy of the subject Notice of Determination was mailed to petitioner on September 7, 2011, as claimed.

11. The facts set forth above in Findings of Fact 5 through 10 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 for shipment to the Division's Mail Processing Center. Mr. Peltier's affidavit avers that he has been a supervisor in the Division's 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.

12. On petitioner's 2010 New York State Nonresident and Part-Year Income Tax Return, dated March 31, 2011, the last return filed by petitioner before the issuance of the Notice of Determination dated September 7, 2011, petitioner reported the same address as that listed on said notice, the request for BCMS conference and the petition filed herein.

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 timely filed, 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. 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 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. Inglesi*, 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*).

D. Petitioner did not respond to the Division’s motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Nagengast and Peltier affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

E. 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).

F. 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 by certified or registered mail to petitioner's last known address (Tax Law § 1147[a][1]; *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*)."

G. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on September 7, 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). 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, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's 2010 New York State Nonresident and Part-Year Income Tax Return, dated March 31, 2011, which

satisfies the “last known address” requirement. It is thus concluded that the Division properly mailed the notice on September 7, 2011 and the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

H. Petitioner’s Request for Conciliation Conference was filed on February 25, 2014. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the Request was untimely (*see* Tax Law §§ 1138[a][1]; 170[3-a][b]) and the same was properly dismissed by the March 14, 2014 Order issued by BCMS. Petitioner 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.

I. The Division’s motion for summary determination is hereby granted, the March 14, 2014 Order dismissing petitioner’s Request is sustained and the petition is denied.

DATED: Albany, New York
February 12, 2015

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