

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANIKA USA, INC. : DETERMINATION
 : DTA NO. 827138
 :
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, 2009 through February 29, 2012. :
:

Petitioner, Anika USA, 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 June 1, 2009 through February 29, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion dated August 18, 2016 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Irina Herman, CPA, failed to timely 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 Notice of Determination number L-042859293.

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 May 6, 2015 and bearing assessment identification number L-042859293. The notice is addressed to petitioner, Anika USA, Inc., at an address in New York, 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 May 6, 2015 Notice of Determination. The request was mailed to BCMS on August 7, 2015.

3. On August 28, 2015, 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 May 6, 2015, but the request was not mailed until August 7, 2015, or 93 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of Notice of Determination number L-042859293¹ on August 7, 2015, the same date that petitioner filed the request for conciliation conference with BCMS for the same notice. By letter dated August 18, 2015, the Petition Intake Section of the Division of Tax Appeals informed petitioner that the

¹ Petitioner listed an incorrect notice number, L-042859298, when it first filed the petition. When petitioner filed a corrected petition, it listed the notice number as L-042859293.

petition as initially filed contained errors, and was not in proper form. The initial petition did not contain a copy of the Notice of Determination as required by 20 NYCRR 3000.3(b)(8), and petitioner checked the box in the initial petition indicating that a conciliation conference was not requested. Petitioner was given 30 days to correct the petition pursuant to 20 NYCRR 3000.3(d)(1).

5. Petitioner subsequently filed a corrected petition, crossing out the box where petitioner had originally indicated a conciliation conference was not requested, and instead checking the box indicating that a conciliation conference was requested and a conciliation order had been issued. Petitioner attached a copy of the August 28, 2015 Conciliation Order Dismissing Request with the corrected petition.

6. To show proof of proper mailing of the May 6, 2015 Notice of Determination, the Division provided the following with its motion papers: i) an affidavit, dated August 15, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 6, 2015; (iii) an affidavit, dated August 16, 2016, of Bruce Peltier, a stores and mail operations supervisor in the Division's mail room; (iv) a copy of the May 6, 2015 Notice of Determination with its associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference, postmarked August 7, 2015, and (vi) petitioner's New York State and Local Sales and Use Tax Web-Filed Return for the period March 1, 2013 through February 28, 2014, which lists the same address for petitioner as that listed on the subject notice and on petitioner's request for conciliation conference. The sales and use tax return was the last return filed with the Division by petitioner before the notice was issued.

7. 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 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 "5/6/15." 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 United States Postal Service (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.

8. 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 taxpayer mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control numbers are 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."

9. The CMR in the present matter consists of 47 pages and lists 512 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 47, which contains 6 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated May 6, 2015 to each page of the CMR, wrote and circled the number "512" on page 47 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 47.

10. Page two of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0456 4191 and reference number L-042859293 was mailed to petitioner at the New York, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted. Additionally, page 26 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0456 6867 and reference number L-042859293 was mailed to petitioner's representative, Irina Herman, CPA, at a Brooklyn, New York, address.

11. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a Stores and Mail Operations Supervisor, describes the mail room's general operations and procedures. The mail room 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 of mail 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. Here, as noted, the USPS employee initialed page 47 and affixed a postmark dated May 6, 2015 to each page of the CMR. The mail room 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. Here, the USPS employee complied with this request by writing and circling the number “512” on the last page next to the heading “Total Pieces Received at Post Office.”

12. According to the Peltier affidavit, a copy of the subject notice was mailed to petitioner and petitioner’s representative on May 6, 2015, as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion for summary determination under sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. 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]).

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 of fact or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. 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, 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. Petitioner did not respond to the Division’s motion by the due date. Accordingly, it is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. 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, Inc. v. Baiden*, at 544; *Whelan v. GTE Sylvania*).

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 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).

E. 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).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on May 6, 2015, as well as to petitioner's representative on that date. 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 sales and use tax return filed for the period March 1, 2013 through February 28, 2014, which satisfies the "last known address" requirement. The CMR also establishes that a copy of the subject notice was mailed to petitioner's representative. It is thus concluded that the Division properly mailed the notice on May 6, 2015, 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]).

G. Petitioner's Request for Conciliation Conference was filed on August 7, 2015. 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][e]) and the same was properly dismissed by the August 28, 2015 Conciliation 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.

H. It is noted that the petition in this matter was initially filed on the same date that petitioner filed the request for conciliation conference, August 7, 2015. As noted above, a taxpayer may protest a notice of determination by filing either a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with BCMS within 90 days from the date of mailing of such notice (Tax Law §§ 1138[a][1]; 170[3-a][a]). Here, both petitioner's request for conciliation conference and petition were filed beyond the 90-day period of limitations. Although the petition was filed on the same date as the request for conciliation conference, the corrected petition was filed subsequent to the issuance of the Conciliation Order Dismissing Request dated August 28, 2015, and is deemed to be a protest of that conciliation order. As such, the Division of Tax Appeals has jurisdiction over the petition in this matter, as the petition was filed within 90 days of the conciliation order dismissing request (Tax Law

§ 170[3-a][e]; 20 NYCRR 4000.5[c][4]) but does not have jurisdiction to consider the substantive merits of the protest because the request for conciliation conference was filed more than 90 days after the issuance of notice.

I. The Division's motion for summary determination is hereby granted, the August 28, 2015 Conciliation Order Dismissing Request is sustained and the petition is denied.

DATED: Albany, New York
December 8, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE