

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
UNCLE GROCERY, DELI & 99C PLUS CORP. :
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, 2009 through :
May 31, 2012. :
: DETERMINATION
: DTA NOS. 827380
: AND 827381
In the Matter of the Petition :
of :
AHMED NAGI AHMED :
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, 2010 through :
May 31, 2012.¹ :
:

Petitioner Uncle Grocery, Deli & 99C Plus Corp., filed a petition for revision of determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2009 through May 31, 2012.

Petitioner Ahmed Nagi Ahmed filed a petition for revision of determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2010 through May 31, 2012.

¹ The captions on the pleadings in Mr. Ahmed's case erroneously reference the period at issue as September 1, 2009 through May 31, 2012. In fact, the subject notice only covers the period September 1, 2010 through May 31, 2012.

On February 26, 2016, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to each petitioner pursuant to 20 NYCRR 3000.9(a)(4). On March 16 and April 12, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Michael J. Hall), having been granted an extension of time, submitted documents in support of dismissal. On April 7 and 14, 2016, petitioners, by The Antonious Law Firm (Jacqueline S. Kafedjian, Esq., of counsel), submitted documents in opposition to dismissal, the latter of which dates commenced the 90-day period for issuance of this order pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4). After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner Uncle Grocery, Deli & 99C Plus Corp., entered into a valid consent for the period in issue and, therefore, the Division of Tax Appeals lacks subject matter jurisdiction over its petition.

II. Whether petitioner Ahmed Nagi Ahmed filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. Petitioner Uncle Grocery, Deli & 99C Plus Corp. (Uncle Grocery), is a New York corporation doing business as a grocery store and deli on Dorchester Road in Brooklyn, New York.

2. At all relevant times, petitioner Ahmed Nagi Ahmed (Mr. Ahmed) was Uncle Grocery's president and sole shareholder.

3. In January 2011, Mr. Ahmed moved to Lumberton, North Carolina. That same year he hired Amer Ahmed (Amer) as an employee to manage Uncle Grocery. In his affidavit submitted as part of this proceeding, Mr. Ahmed described Amer's role:

“[Amer] was responsible for the daily management operations of the business, including, collecting sales tax and filing sales tax returns. . . . He was neither a shareholder nor an officer of the business, only an employee. I never gave him authority to enter into contracts on behalf of the business or to execute consents to any tax due.”

4. In 2013, the Division of Taxation (Division) performed a sales and use tax audit of Uncle Grocery. On August 15, 2013, at the conclusion of the audit, the Division issued a Statement of Proposed Audit Change to Uncle Grocery, asserting additional sales and use tax of \$52,659.14 and interest of \$11,099.59 for the period September 1, 2009 through May 31, 2012. The statement included a proposed consent that called for agreement to the assessed amounts of tax and interest, waiver of any rights to the issuance of a notice of determination or a hearing, and that any future challenge to its findings would require prepayment and a timely refund claim. The consent was signed by an “Owner, Partner, or Corporate Officer or Authorized Representative” of Uncle Grocery on September 14, 2013, but the signatory and his handwritten entry for title are unclear. The Division maintains that the consent was signed by Mr. Ahmed, while he maintains it was signed by his employee, Amer, without proper authority.

5. On November 22, 2013, the Division issued to Uncle Grocery Notice and Demand for Payment of Tax Due number L-040435803 (Notice and Demand) in the amount of \$52,659.14 in sales and use tax and \$11,983.35 in interest for the period September 1, 2009 through May 31, 2012. The Notice and Demand was predicated on the consent that was signed on September 14, 2013 by either Mr. Ahmed or Amer on behalf of Uncle Grocery.

6. On November 27, 2013, the Division issued Notice of Determination number L-040454828 (Notice of Determination) to Mr. Ahmed as a responsible person of Uncle Grocery pursuant to Tax Law § 1133. The Notice of Determination assessed sales and use tax of \$33,348.57 and interest of \$5,995.67 for the period September 1, 2010 and May 31, 2012.² The Notice of Determination was addressed to Mr. Ahmed at “4624 Avenue D, Brooklyn, New York 11203-5816.”

7. Mr. Ahmed electronically filed his 2011 New York State resident income tax return on or about February 20, 2012. On his 2011 return, Mr. Ahmed listed his address as 4624 Avenue D, Brooklyn, New York 11203. The record lacks evidence of the filing of any subsequent New York returns by Mr. Ahmed. It also lacks evidence of any notification by Mr. Ahmed to the Division of a change in address between February 2012 and November 27, 2013.

8. On December 15, 2015, Uncle Grocery filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice and Demand.

9. On February 26, 2016, Daniel J. Ranalli, the Supervising Administrative Law Judge of the Division of Tax Appeals issued to Uncle Grocery a Notice of Intent to Dismiss Petition. The notice of intent indicates that pursuant to Tax Law § 173-a, the Division of Tax Appeals lacks jurisdiction to hear the merits of a petition that is filed in protest of a notice and demand. Additionally, Judge Ranalli noted that Uncle Grocery executed a consent, thereby waiving its rights to a hearing.

10. Additionally, on December 15, 2015, Mr. Ahmed filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination.

² Neither party explained why the period covered in Mr. Ahmed’s Notice of Determination, unlike that of Uncle Grocery, did not include September 1, 2009 through August 31, 2010.

11. In his petition challenging his responsible person assessment, Mr. Ahmed asserted that after he moved to North Carolina in January 2011, “he was not ‘a person required to collect tax’ for the business from that date forward,” and “he no longer managed the day-to-day operation of the business, collected business income, made business deposits, or signed tax returns.”

12. On February 26, 2016, Judge Ranalli issued to Mr. Ahmed a Notice of Intent to Dismiss Petition. The notice of intent indicates that all proceedings before the Division of Tax Appeals must be commenced by the timely filing of a petition in protest of a statutory notice, which, here, is 90 days after issuance of the notice. In this case, Judge Ranalli noted that the statutory notice was issued on November 27, 2013, but that the petition was filed on December 15, 2015, or 748 days later. As a result, the Division of Tax Appeals is without jurisdiction to hear the merits of Mr. Ahmed’s petition.

13. Both petitioners submitted the same packet of materials in response to the issuance of their respective notices of intent to dismiss petition. The documents submitted were i) the affidavit of Mr. Ahmed; ii) a printout of the New York State Department of State’s entity information from its Division of Corporations; iii) a copy of Mr. Ahmed’s North Carolina driver’s license issued on March 2, 2011; iv) a copy of a North Carolina certificate of title for a motor vehicle dated March 18, 2011; v) the relevant statutory notices; and vi) a responsible person questionnaire completed by Amer and signed on August 28, 2015.

14. In his affidavit, Mr. Ahmed asserts that he was Uncle Grocery’s president and sole shareholder since its 2005 incorporation. He states that in January 2011, he moved to Lumberton, North Carolina, and that he “has regularly been filing” all of his state income tax

returns with that address.³ As noted in Finding of Fact 3, Mr. Ahmed adds that he hired Amer to perform the daily management of Uncle Grocery, including collecting sales tax and filing returns. Mr. Ahmed states, however, that he did not authorize Amer to execute the consent on behalf of Uncle Grocery. Finally, Mr. Ahmed avers that he was “never mailed” a copy of the Notice of Determination.

15. In response to the issuance of the Notice of Intent to Dismiss Petition to Uncle Grocery, the Division submitted a copy of the signed consent.

16. Meanwhile, in response to the issuance of the Notice of Intent to Dismiss Petition to Mr. Ahmed, the Division submitted, among other documents, (i) an affidavit of Michael J. Hall, a law clerk employed in the Office of Counsel of the Division, dated April 11, 2016; (ii) an affidavit, dated March 21, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked November 27, 2013; (iv) an affidavit, dated March 23, 2016, of Bruce Peltier, a mail and supply supervisor in the Division’s mail room; and (v) a reproduction of Mr. Ahmed’s resident income tax return for the year 2011, electronically filed on or about February 20, 2012, which lists the same Brooklyn, New York, address as listed on the Notice of Determination. The 2011 return was the last return filed with the Division by Mr. Ahmed before the Notice of Determination was issued.

17. 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

³ Although Mr. Ahmed references certain tax returns, he did not attach copies of them to his affidavit.

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 "11/27/13." 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 U.S. 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.

18. 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 P.O. Address."

19. The CMR in the present matter consists of 33 pages and lists 361 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 33, which contains 9 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 November 27, 2013 to each page of the CMR, circled the number “361” on page 33 next to the heading “Total Pieces And Amounts” and initialed or signed page 33. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 361.

20. Page 11 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0101 7119 and reference number L-040454828 was mailed to “AHMED - AHMED N” at the Brooklyn, New York, address listed on the Notice of Determination. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number, the name “AHMED - AHMED N” and address as noted.

21. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Clerk and supervisor in the Division’s Mail Processing Center. The affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

22. In this particular instance, the postal employee affixed a postmark dated November 27, 2013 to each page of the 33-page CMR. On page 33, the postal employee also wrote his or her

initials or signature and circled the number “361” near the stamp affixed by the clerk requesting that the post office handwrite the total number of pieces and initial the form.

23. Based upon his review of Ms. Nagengast’s affidavit, the exhibits attached thereto and the CMR, Mr. Peltier states that on November 27, 2013, an employee of the Mail Processing Center delivered to a branch of the USPS in Albany, New York, in sealed envelopes for delivery by certified mail a piece of certified mail addressed to Mr. Ahmed at his Brooklyn, New York, address. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 27, 2013 for the records of the Department. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner on November 27, 2013.

24. In addition to the materials submitted by petitioners in response to both notices of intent to dismiss (*see* Finding of Fact 13), Mr. Ahmed submitted an undated one-page printout, entitled “USPS Tracking” and purportedly from the USPS. The document, offered in reply to the Division’s proof of mailing of the Notice of Determination, references tracking number 7104 1002 9730 0101 7119, and states “[t]he Postal Service could not locate the tracking information for your request. Please verify your tracking number and try again later.” Mr. Ahmed did not submit any foundational affidavit or other evidence explaining the USPS printout.

CONCLUSIONS OF LAW

A. “The standard for reviewing a Notice of Intent To Dismiss Petition is the same as reviewing a motion for summary determination” (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). As provided in section 3000.9(b)(1) of the Rules, 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.” Section 3000.9(c) of the Rules of Practice and Procedure 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, 573 [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 [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, 448-449 [1992] citing *Zuckerman*).

Petition of Uncle Grocery

B. The crux of Uncle Grocery’s argument against dismissal is that the consent giving rise to the Notice and Demand is invalid and must be disregarded. Tax Law § 171(18) provides that the Commissioner of Taxation and Finance shall:

“Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact . . . (b) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance therewith, shall not be annulled, modified, set aside or disregarded.”

C. Pursuant to Tax Law § 1138(c):

“A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due assessed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.”

It is well settled that a valid consent creates fixed and final liabilities (*see Matter of Brewsky’s Goodtimes Corporation*, Tax Appeals Tribunal, February 22, 2001). Such a consent would appropriately give rise to a notice and demand should payment remain outstanding (*see* Tax Law § 173-a[3][b][1]). Crucially, a taxpayer gives up the right to protest the assessment by execution of the consent (*see Matter of SICA Electrical & Maintenance Corp.*, Tax Appeals Tribunal, February 26, 1998). The Tax Appeals Tribunal has held that while it may be appropriate to reopen a closed matter in extraordinary circumstances, the need for finality of proceedings requires “a strict view of attempts by either petitioners or the Division to reopen or to reargue matters which have been closed” (*Matter of D & C Glass Corp.*, Tax Appeals Tribunal, June 11, 1992).

D. In the instant case, Mr. Ahmed maintains that there is no such valid consent as Amer lacked the authority to bind Uncle Grocery. The evidence in the record, however, even when examined most favorably to Uncle Grocery, does not support that assertion. According to Mr. Ahmed’s own affidavit, Amer was hired to manage Uncle Grocery and “was responsible for the

daily management operations of the business, including, collecting sales tax and filing sales tax returns.” Therefore, Amer was “[a] person liable for collection or payment of tax” on behalf of Uncle Grocery. This authority allowed Amer to enter into the consent pursuant to Tax Law §§ 171(18) and 1138(c). Contrary to Mr. Ahmed’s unsupported, self-serving assertion that Amer lacked the requisite authority, the conceded permission for Amer to manage the business operations, collect taxes, and file Uncle Grocery’s tax returns actually gave him that exact authority under the Tax Law. Indeed, the filing of a tax return itself equates to consent to the stated tax due.

Meanwhile, the Division asserts that the consent was signed by Mr. Ahmed, who admittedly was the 100% shareholder and president of Uncle Grocery. As such, he clearly was authorized to sign the consent and bind the company (*see Matter of La Naj Home Furnishings, Inc.*, Tax Appeals Tribunal, January 31, 2013). Hence, under either factual scenario, as a matter of law, the consent was validly executed.

Finally, there has been no showing by Uncle Grocery of fraud, malfeasance, or misrepresentation of a material fact in order to void the consent as called for in Tax Law § 171(18) (*see Matter of Brahms*, Tax Appeals Tribunal, July 3, 1997, *confirmed* 256 AD2d 822 [1998]). Mr. Ahmed’s concessions as to the scope of Amer’s authority remove any question on that point. Thus, based on the evidence presented in the parties’ responses, Uncle Grocery’s petition was properly dismissed.

Petition of Ahmed Nagi Ahmed

E. Meanwhile, Mr. Ahmed contests dismissal of his petition as untimely by contending that the Division mailed the statutory notice to the wrong address. Where the timeliness of a petition is at issue, as it is here, the initial inquiry is whether the Division has carried its burden

of demonstrating proper mailing of the statutory notice to petitioner's last known address (*see* 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*).

Additionally, Tax Law § 1138(a)(1) requires that the Notice of Determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., November 27, 2013, to Mr. Ahmed's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this particular case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR matches the address listed on Mr. Ahmed's New York State Resident Income Tax Return for the tax year 2011, which, according to this record, was the last return filed by him (*see* Tax Law § 1147[a][1]) and, therefore, satisfies the “last known address” requirement in Tax Law § 1138(a)(1). Although Mr. Ahmed may have moved to North Carolina in 2011, the record is devoid of any evidence that he provided the Division with another address subsequent to his

2011 tax return.⁴ His bald claim that he has been “regularly” filing his tax returns with his North Carolina address, without more, is insufficient. Further, contrary to Mr. Ahmed’s assertion, the Division’s proof in support of dismissal includes the mailing cover sheet. Consequently, it is concluded that the Notice of Determination was properly mailed and the statutory 90-day time limit to file either a request for conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals commenced on November 27, 2013 (Tax Law §§ 170[3-a][a]; 1138[a][1]). Meanwhile, Mr. Ahmed’s petition was not mailed until December 15, 2015, or well beyond the 90-day statutory period. Consequently, the Division of Tax Appeals has no jurisdiction to hear and determine the subject matter of his petition (*see Matter of McAleese*, Tax Appeals Tribunal, June 30, 2016).

G. Finally, it is noted that petitioners’ argument with regard to the purported USPS tracking information has been considered and rejected. The document lacks any foundational affidavit or evidentiary explanation whatsoever. Thus, it is no more than a bare assertion that the USPS could not locate tracking information at one instance for item number 7104 1002 9730 0101 7119. There is no indication of the time period searched or if the tracking number was reused by the USPS. It also does not state that the document was not delivered. Ultimately, it is significant that Mr. Ahmed never actually disputes receipt of the Notice of Determination. He simply challenges, albeit unsuccessfully, the Division’s proof of mailing. Such bare assertions are insufficient to rebut the presumption of receipt (*see Matter of T.J. Gulf v. State Tax Commn.*, 124 AD2d 314 [1986]).

⁴ Mr. Ahmed submitted a copy of his North Carolina drivers license and automobile registration in his response to the instant notice of intent to dismiss. Obviously, this recent submission does not cure his pre-notice failure to provide evidence to the Division of a relocation.

H. The petitions of Uncle Grocery, Deli & 99C Plus Corp. and Ahmed Nagi Ahmed are hereby dismissed.

DATED: Albany, New York
July 21, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE