

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LARRY D. NAPIER, JR. : DETERMINATION
 : DTA NO. 827392
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, 2014. :
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Petitioner, Larry D. Napier, Jr., 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, 2014. On September 2, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), filed a motion seeking to dismiss the petition or, in the alternative, seeking summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Petitioner, appearing by Steven Nussbaum, Esq., filed a response to the Division of Taxation's motion by the due date of October 2, 2016, which date commenced the 90-day period for the issuance of this determination. After due consideration of the affidavits, documents and arguments presented, Catherine M. Bennett, 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. The subject of the motion of the Division of Taxation (Division) is the timeliness of

petitioner's protest of a Notice of Determination, Assessment ID # L-042587538-5, dated March 17, 2015, addressed to petitioner, Larry D. Napier, Jr., USA Paving, at a Walter Smith Road, Catskill, New York, address. The notice assessed sales and use taxes due in the amount of \$53,243.04, plus interest and penalty, for the period September 1, 2008 through August 31, 2014. The mailing cover sheet that accompanied the Notice of Determination contained Certified Control No. 7104 1002 9730 0422 6662.

2. Petitioner filed a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) concerning sales and use taxes for the periods "2008-2014." The request references a notice dated October 28, 2015, and identified as notice L-042587538.¹ The basis for petitioner's Request is his assertion that "no sales taxes [were] charged due to the work was [sic] capital improvement and couldn't charge tax on it." The address borne by the Request was a Picnic Woods Road, Clintondale, New York, address and the Request is dated October 29, 2015, the date it was filed.

3. BCMS issued a Conciliation Order Dismissing Request (CMS No. 268371) to petitioner dated November 13, 2015. 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 date of the statutory notice. Since the notice was issued on March 17, 2015, but the request was not mailed until October 29, 2015, or in excess of 90 days, the request is late filed."

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on December 23, 2015, bearing the same Clintondale, New York, address as the Request.

¹ A notice bearing this date was not submitted as part of the record, and no further information about this document is available.

5. To show proof of proper mailing of the Notice of Determination in issue, the Division provided, along with the September 1, 2016 affidavit of Adam Roberts, Esq., the following with its motion papers: i) an affidavit, dated August 15, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division (since October 2005), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (ii) an affidavit, dated August 16, 2016, of Bruce Peltier, a Division mail room supervisor (since March 1999); (iii) the New York State Department of Taxation and Finance Certified Record for Presort Mail-Assessments Receivable (CMR) date-stamped March 17, 2015; (iv) a copy of petitioner's Notice of Determination, dated March 17, 2015, as described in Finding of Fact 1; (v) the petition filed with the Division of Tax Appeals with a copy of the face of its mailing envelope bearing a postmark of December 23, 2015, and date-stamped as received by the Division of Tax Appeals on December 28, 2015; and (vi) a copy of petitioner's Form MT-903-MN Highway Use Tax Return for the period July 1, 2014 through September 30, 2014, dated July 7, 2014, and according to the Division's records, filed on July 9, 2014.

6. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and assigned a certified control number. The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each statutory notice. CARTS also generates any enclosures referenced within the body of each notice. Each batch of statutory notices is accompanied by a CMR, listing each statutory notice being mailed, with a certified control number assigned to each, and specified under the heading entitled

“CERTIFIED NO.” 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.”

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing. Following the Division’s general practice, this date was manually changed on the first and last pages of the CMR to reflect the actual mailing date of the notice, i.e., “3/17/15.”

7. According to the Nagengast affidavit, the CMR consists of 45 cut sheet pages and lists 491 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated that 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 her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page. Ms. Nagengast notes that portions of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled the “491” on page 45 and initialed the same page.

Page 37 of the CMR indicates that a statutory notice with certified control number 7104 1002 9730 0422 6662 and assessment number L-042587538 was mailed to petitioner at the Walter Smith Road, Catskill, New York, address listed on the subject notice.

8. The affidavit of Bruce Peltier, a mail room supervisor, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” A staff member operates a machine that puts each notice and the associated

documents into a windowed envelope so the addresses and certified number from the Mailing Cover Sheet show through the windows. That staff member then weighs, seals and places 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 signature or initials on the CMR, indicating receipt by the post office. The Mail Processing Center further requests that the USPS employee 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.

9. On the CMR dated March 17, 2015, Mr. Peltier noted that the USPS employee initialed or signed the last page, i.e., page 45, of the CMR and affixed a postmark dated March 17, 2015, to each page of the CMR. In addition, the USPS employee complied with the request to circle or write the number of pieces to verify such number by circling the number "491" on the last page under the heading Total Pieces Received at Post Office. Based upon his review, Mr. Peltier attested to the fact that petitioner's name and his address as set forth on the statutory notice would have been displayed in the window of the envelope.

10. According to the Nagengast and Peltier affidavits, the subject Notice of Determination was mailed to petitioner on March 17, 2015, as claimed, to his Catskill, New York, address.

11. The Division submitted a copy of petitioner's Form MT-903-MN, Highway Use Tax Return, dated July 7, 2014. According to the Division's records, this return was filed on July 9, 2014, and is the last return filed with the Division before the Notice of Determination was issued.

The address appearing on the return is the same Catskill, New York, address as the one listed on the statutory notice and the CMR.

12. Petitioner responded to the motion by asserting deficiencies in the Division's proof of mailing documentation and the affidavits submitted, and he maintained that a conclusion should be reached that a Notice of Determination was never mailed to petitioner. Concerning the merits of the sales tax matter, petitioner asserts that there was no proof that the Division made a request in writing for petitioner to produce his books and records for audit. Further, petitioner argues that the work he performed was strictly in the nature of capital improvement and not work for which he would collect sales tax. Lastly, petitioner asserts that the failure to have access to his business records is supported by his separation from his wife and an order of protection against him during the period in question.

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 filed within 90 days of the conciliation order (*see* Findings of Fact 3 and 4), 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.

B. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]). Section

3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to Civil Practice Law and Rules § 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 [1980]). Inasmuch 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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d 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*).

Petitioner has presented no evidence to contest the facts set forth in the Nagengast and Peltier affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a notice of determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient,” or for additional tax or penalties due under Articles 28 and 29. This section further provides that such a notice “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.” A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination (*see* Tax Law §§ 1138[a][1]; 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a petitioner’s protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be 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). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mary Ellen Nagengast and Bruce Peltier, Division employees involved in and possessing knowledge of the process. Moreover, it is observed that the CMR in this matter is properly completed and, as such, constitutes highly probative documentary evidence of the mailing of the subject notice to the address listed and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits, together with the properly completed CMR, establish that such procedures were followed in the present matter. The Division has thus established that it mailed a copy of the subject notice to the address listed on the CMR on March

17, 2015. Additionally, petitioner's Catskill, New York, address as listed on the CMR and on the notice conforms with the address reported on the last return filed with the Division prior to the issuance of the subject statutory notice. Although petitioner stated in his petition that he did not receive any notices from the Division since July 2013, due to his separation from his spouse, petitioner did not keep the Division properly apprized of his change of address, if one existed. Having offered nothing further, petitioner is deemed to have admitted that his last known address was the one asserted by the Division and used in the mailing of the statutory notice (*see Kuehne & Nagel*). Accordingly, the Division has satisfied the "last known address" requirement in Tax Law § 1138(a)(1).

E. As the Division has established that it properly mailed the subject Notice of Determination on March 17, 2015, 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]). Petitioner's Request for Conciliation Conference was filed on October 29, 2015. This date falls well after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law §§ 1138[a][1]; 170[3-a][b]). Accordingly, the Division has established a prima facie case warranting a determination in its favor and the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

F. The Division of Taxation's motion for summary determination is hereby granted, and the petition of Larry D. Napier, Jr., is denied.

DATED: Albany, New York
December 22, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE