

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ASHFAQ MANNAN : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 827394
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2012 through May 31, 2013. :

Petitioner, Ashfaq Mannan, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2012 through May 31, 2013.

On August 16, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(b). Petitioner, appearing by Mills & Mills (John M. Mills, III, Esq., of counsel), filed a response to the Division of Taxation's motion by his due date of September 15, 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 five notices 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 the following five notices of determination, each dated January 30, 2015:

Assessment ID No.	Tax Period Ended	Tax Assessed	Interest Assessed	Penalty Assessed	Payments/Credits	Balance Due
L-042442586-8	8-31-12	\$6,697.12	\$2,366.82	\$1,829.11	\$1,000.00	\$9,893.05
L-042442585-9	11-30-12	\$19,395.87	\$6,949.35	\$5,818.58	0.00	\$32,163.80
L-042442584-1	2-28-13	\$6,224.21	\$1,933.20	\$1,867.22	0.00	\$10,024.63
L-042442583-2	5-31-13	\$50.00	0.00	0.00	0.00	\$50.00
L-042442582-3	5-31-13	\$6,354.85	\$1,674.94	\$1,842.74	0.00	\$9,872.53

All five notices are addressed to petitioner, Ashfaq Mannan, at a Lake Hiawatha, New Jersey, address, and assert sales and use taxes due in the amounts and for the periods described above as a responsible officer or person of Saira Enterprises, Inc. The mailing cover sheet that accompanied each of the notices contained Certified Control Nos. 7104 1002 9730 0384 4584, 7104 1002 9730 0384 4577, 7104 1002 9730 0384 4560, 7104 1002 9730 0384 4553 and 7104 1002 9730 0384 4546, respectively.

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 "2012 & 2013."¹ The basis for petitioner's Request is his assertion that he has no relationship with Saira Enterprises, Inc., Ten Ten Enterprises, Inc., or 101 Smoke Shop, Inc. The address borne by the Request was "Saira Enterprises Inc., 1520 Westchester Avenue, Bronx, NY 10472." The Request is dated November 12, 2015, and according to the Division's affidavit, the Request was filed on November 13, 2015.

¹ Petitioner's Request references a notice dated May 18, 2015, but it was not submitted as part of the record, and no further information about this document is available.

3. BCMS issued a Conciliation Order Dismissing Request (CMS No. 268577) to petitioner dated December 4, 2015. The order determined that petitioner's protest of the subject notices 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(s) was issued on January 30, 2015, but the request was not received until November 16, 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 28, 2015, bearing the same Lake Hiawatha, New Jersey, address as the notices.

5. To show proof of proper mailing of the notices of determination in issue, the Division provided, along with the August 16, 2016 affidavit of Anita K. Luckina, Esq., the following with its motion papers: (i) an affidavit, dated July 28, 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 1, 2016, of Bruce Peltier, a mail room supervisor in the Division's Mail Processing Center (since March 1999); (iii) the “New York State Department of Taxation and Finance Certified Record for Presort Mail - Assessments Receivable” (CMR) date-stamped January 30, 2015; (iv) copies of petitioner's five notices of determination, dated January 30, 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 28, 2015 and date-stamped as received by the Division of Tax Appeals on December 30, 2015; and (vi) a copy of petitioner's e-filed Form IT-203, Nonresident and Part-Year Resident Income Tax Return, for tax year 2013, dated October 6, 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. 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 in the present case to reflect the actual mailing date of the five notices pertinent to this matter, i.e., "1/30/15."

7. According to the Nagengast affidavit, the CMR consists of 67 cut sheet pages and lists 735 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 a USPS representative affixed a U.S. postmark to each page of the CMR, wrote "735" on page 67 and initialed or signed the same page.

Page two of the CMR indicates that five statutory notices with certified control numbers 7104 1002 9730 0384 4546, 7104 1002 9730 0384 4553, 7104 1002 9730 0384 4560, 7104 1002 9730 0384 4577, and 7104 1002 9730 0384 4584, and assessment ID numbers L-042442582, L-042442583, L-042442584, L-042442585, and L-042442586, respectively, were mailed to petitioner at the Lake Hiawatha, New Jersey, address listed on the subject notices.

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 address 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. Regarding the CMR dated January 30, 2015, Mr. Peltier noted that the USPS employee initialed or signed the last page, i.e., page 67, and affixed a postmark dated January 30, 2015 to each page of the CMR. In addition, the USPS employee complied with the request to circle or

write the number of pieces received to verify such number by writing the number “735” 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 notices would have been displayed in the windows of the envelopes.

10. According to the Nagengast and Peltier affidavits, the subject notices of determination were mailed to petitioner on January 30, 2015, as claimed, to his Lake Hiawatha, New Jersey, address.

11. The Division submitted a copy of petitioner’s e-filed Form IT-203, Nonresident and Part-Year Resident Income Tax Return, for tax year 2013. The return bears the date of October 6, 2014, and according to the Division’s records, it is the last return filed with the Division before the notices were issued. The address appearing on the return is the same Lake Hiawatha, New Jersey, address as the one listed on the statutory notices and the CMR.

12. Petitioner responded to the motion by addressing the merits of petitioner’s status as a responsible officer. No arguments were made by petitioner referencing the timeliness of his protest of the notices.

CONCLUSIONS OF LAW

A. 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 [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, 544 [1975]; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

B. Tax Law § 1138(a)(1) authorizes the Division 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. . . .” 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.”

C. Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination for additional tax or penalties due under Articles 28 and 29. 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 notices 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 was properly completed and, as such, constitutes highly probative documentary evidence of the mailing of the subject notices 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 copies of the subject notices to the address listed on the CMR on January

30, 2015. Additionally, petitioner's Lake Hiawatha, New Jersey, address as listed on the CMR and on the notices conforms with the address reported on the last return filed with the Division prior to the issuance of the subject statutory notices. 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 five notices (*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 notices of determination on January 30, 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 November 13, 2015.² 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][a]). 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 Ashfaq Mannan is denied.

DATED: Albany, New York
December 8, 2016

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE

² Although the date of filing of the Request, according to the Division's affidavit, is November 13, 2015, and the date of mailing of the Request, according to the Conciliation Order, was November 16, 2015, the discrepancy is inconsequential, since even the earliest date is beyond the 90-day time period.