

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFFREY DIBERNARDO	:	DETERMINATION
for Revision of a Determination or for Refund	:	DTA NO. 827399
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 2012	:	
through May 31, 2012.	:	

Petitioner, Jeffery DiBernardo, 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 March 1, 2012 through May 31, 2012.

On August 16, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), filed a motion seeking summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(b). Accompanying the motion was the affidavit of Anita Luckina, Esq., dated August 16, 2016, together with additional affidavits and annexed exhibits supporting the motion. Petitioner, appearing by Ross Strent & Company, LLP (Brian Simonetti, CPA), and having until November 8, 2016 to respond, filed a letter dated October 21, 2016 in opposition to the motion of the Division of Taxation. The 90-day period for issuance of this determination commenced on November 8, 2016 (20 NYCRR 3000.5[b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest following the Division of Taxation's issuance of a notice of determination assessing tax, penalties and interest against him.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination (Assessment ID L-042907986-3), dated May 21, 2015, to petitioner, Jeffrey DiBernardo, assessing sales tax due for the quarterly period spanning March 1, 2012 through May 31, 2012 in the amount of \$25,092.80, plus penalty and interest. The foregoing notice was issued to petitioner upon the Division's assertion that he was a person under a duty to collect, account for and remit sales and use taxes on behalf of NYC 36th LLC, for the period specified in the notice.

2. Petitioner challenged the foregoing notice by filing a Request for Conciliation Conference (Request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). The Request is dated as signed on November 16, 2015. The mailing envelope in which the Request together with a cover letter and other documents was enclosed bears a United States Postal Service (USPS) postage stamp dated November 17, 2015, and all of such documents, including the Request and the envelope, bear a BCMS receipt stamp dated November 19, 2015.

3. By a Conciliation Order Dismissing Request (CMS No. 268578) dated December 4, 2015 (Dismissal Order), BCMS dismissed petitioner's Request as not timely filed, stating:

"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 May 21, 2015, but the request was not mailed until November 17, 2015, or in excess of 90 days, the request is late filed."

4. Petitioner challenged the Dismissal Order by filing a petition with the Division of Tax

Appeals. The petition, mailed by certified mail, is dated as signed on December 19, 2015. The mailing envelope in which the petition, together with other documents, was enclosed bears a United States Postal Service (USPS) postage stamp dated December 22, 2015, and all of such documents, including the petition and the envelope, bear a Division of Tax Appeals receipt stamp dated December 28, 2015.

5. To show proof of proper mailing of the Notice of Determination on May 21, 2015, the Division provided the following: (i) an affidavit, dated August 16, 2016, of Anita Luckina, Esq.; (ii) an affidavit, dated July 28, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated August 1, 2016, of Bruce Peltier, a stores and operations supervisor and a supervisor in the Division's mail room; (iv) the 26-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated May 21, 2015 together with its associated mailing cover sheet; and (vi) a copy of petitioner's e-Filed Form IT-201 (Resident Income Tax Return) for the year 2014.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the notices of determination at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" generated for each such notice, and that

sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

7. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices is forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

8. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time

of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the

following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on May 21, 2015, including the Notice addressed to petitioner, consists of 26 cut sheet pages. Each of these pages includes in its upper left corner the preprinted year/day/time “run” listing of “20151341700” (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages 1 and 26 is the handwritten date “5/21/15,” indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the foregoing 26 pages includes a legible USPS postmark of the Colonie Center Postal Service branch office, dated May 21, 2015 and listing zip code “12205,” and each such postmark has been initialed. Each page of the CMR includes 11 entries for pieces of mail, except for page 26 (the final page), which includes 1 entry for pieces of mail, thus resulting in 276 entries for pieces of mail in total.

11. In this instance, certified control number 7104 1002 9730 0460 8093 was assigned to the reference (i.e., assessment) number L-042907986, and was to be mailed to petitioner, Jeffrey DiBernardo, at 4 Randi Court, Melville, NY 11747. This information appears on the Notice of Determination and on the cover sheet associated therewith, and also appears at page 17 of the CMR.¹

12. Appearing below the sole entry on page 26 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this

¹ The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

CMR, here 276, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office.” The preprinted number of pieces of mail is circled. Appearing at the lower right area of page 26 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately to the right of this stamped instruction reflects the aforementioned May 21, 2015 USPS postmark as well as initials affixed by the postal clerk.

13. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and supervisor in the Division’s mail room (*see* Finding of Fact 5). Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. The record includes a copy of the Notice of Determination allegedly mailed by certified mail to petitioner, Jeffrey DiBernardo, on May 21, 2015, as described. The record also includes petitioner’s New York State Resident Income Tax Return (Form IT-201) as e-Filed for the year 2014 (*see* Finding of Fact 5). This return was the last return filed by petitioner prior to the date of issuance of the notice at issue, and it lists petitioner’s address as “4 Randi Court, Melville, NY, 11747.” This address consistently appears on the Notice, the Request, the petition and the cover letter to the BCMS Dismissal Order.

15. Petitioner responded to the Division’s motion for summary determination, stating that he was confronted with significant personal medical issues that left him unable to attend to

personal or business matters including responding to the Notice of Determination. Petitioner also raised the substantive claim that he should be afforded relief from liability imposed (as here) against responsible persons under the Division's Technical Memorandum (TSB-M-11[6]S) dated April 14, 2011.

CONCLUSIONS OF LAW

A. 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 the date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may protest a notice of determination by filing a Request with BCMS "if the time to petition for such a hearing has not elapsed" (Tax Law § 170[3-a][a]). It is well established that the 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 Voelker*, Tax Appeals Tribunal, August 31, 2006; *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).

B. In this case, petitioner chose to file a request with BCMS, rather than a petition with the Division of Tax Appeals, in the first instance. In turn, BCMS dismissed petitioner's Request as not timely filed. Petitioner thereafter challenged the BCMS Dismissal Order by filing a petition with the Division of Tax Appeals. There is no dispute that the petition was filed well within the 90

day statutory time limit for filing a petition following the issuance of a conciliation order (*see* Findings of Fact 3 and 4; Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]).

C. The Division brings a motion under section 3000.9(a) of the Rules of Practice and Procedure (Rules) for summary determination under section 3000.9(b). Since, as noted, the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition. Therefore, the Division's 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 a conciliation conference.

D. 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]). 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. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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 [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* at 562). Petitioner did not respond to the Division’s motion, and as detailed hereafter, there exist no material and triable issues of fact, and the Division is entitled to summary determination in its favor.

E. Where, as here, the timeliness of a Request is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner’s last known address (Tax Law § 1138[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). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory 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*).

F. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating

proper mailing in the first instance rests with the Division (*id*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed by certified mail addressed to petitioner on May 21, 2015. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and address, as well as the numerical information on the notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of May 21, 2015 and the initials of the USPS employee. There are 276 certified mail control numbers listed on the CMR for May 21, 2015, and the USPS employee who initialed the CMR indicated, by circling the number "276", that 276 items were received for mailing. The CMR has thus 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; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

H. Given the foregoing, the notice in question was properly issued by the Division on May 21, 2015, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891 [1986]; *Matter of Rosen*,

Tax Appeals Tribunal, July 19, 1990). However, petitioner's Request was not filed until November 17, 2015 (*see* Finding of Fact 2), a date that falls well beyond the 90-day statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, there is no jurisdiction to address the substantive merits of petitioner's protest (*Matter of Sak Smoke Shop*).

I. The Division's motion for summary determination is hereby granted, the December 4, 2015 Conciliation Order Dismissing Request is sustained, and the petition of Jeffrey DiBernardo is denied.

DATED: Albany, New York
February 2, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE