

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PHILIP BARRETTI	:	DETERMINATION
for Revision of a Determination or for Refund	:	DTA NO. 827527
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 2011	:	
through May 31, 2014.	:	

Petitioner, Philip Barretti, 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 December 1, 2011 through May 31, 2014.

On November 9, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), filed a motion seeking dismissal of the petition or summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9 (a) and (b). Accompanying the motion was the affidavit of Robert A. Maslyn, Esq., dated November 7, 2016, and annexed exhibits supporting the motion. Petitioner, appearing by David A. Fusco, CPA, did not file a response in opposition to the motion of the Division of Taxation. The 90-day period for issuance of this determination commenced on December 9, 2016 (20 NYCRR 3000.5[d]). 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-042551814, dated March 3, 2015, to petitioner, Philip Barretti, assessing sales tax due for the period spanning December 1, 2011 through May 31, 2014 in the amount of \$136,993.09, 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 730 11th Avenue Corporation 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 February 4, 2016. The Request was filed by facsimile transmission dated February 4, 2016, and likewise bears a BCMS receipt stamp dated February 4, 2016.

3. By a Conciliation Order Dismissing Request (CMS No. 269344) dated February 19, 2016 (Dismissal Order), BCMS dismissed petitioner's Request as not timely filed, stating:

“[t]he 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 March 3, 2015, but the request was not received until February 4, 2016, 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 March 4, 2016. The mailing envelope in which the petition together with other documents was enclosed was mailed

by certified mail, bears a machine-metered (Pitney Bowes) postage stamp dated March 5, 2016, and all of such documents, including the petition and the envelope, bear a Division of Tax Appeals receipt stamp dated March 9, 2016.

5. To show proof of proper mailing of the Notice of Determination on March 3, 2015, the Division provided the following: (i) an affidavit, dated November 7, 2016, of Robert A. Maslyn, Esq.; (ii) an affidavit, dated November 2, 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 November 4, 2016, of Bruce Peltier, a stores and mail operations supervisor in the Division's mail room; (iv) the 44-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated March 3, 2015 together with its associated mailing cover sheet; (vi) a copy of petitioner's e-filed Form IT-203 (Nonresident and Part-Year Resident Income Tax Return) for the year 2013; (vii) an affidavit, dated November 4, 2016, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; and (viii) a United States Postal Service (USPS) Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the response thereto.

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 Notice 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 within 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 CMR and associated batch of statutory notices are 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 March 3, 2015, including the notice addressed to petitioner, consists of 44 cut sheet pages. Each of these pages includes in its upper left corner the preprinted year/day/time “run” listing of “20150551700” (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages 1 and 44 is the handwritten date “3/3/15,” indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the foregoing 44 pages includes a legible USPS postmark of the Colonie Center postal service branch office, dated March 3, 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 44 (the final page), which includes 8 entries for pieces of mail, thus resulting in 481 entries for pieces of mail in total.

11. In this instance, certified control number 7104 1002 9730 0407 8780 was assigned to the reference (i.e., assessment) number L-042551814, and was to be mailed to petitioner, Philip Barretti, at 3 Robin Hill Rd, N Caldwell, New Jersey, 07006-4217. This information appears on the Notice of Determination and on the mailing cover sheet associated therewith, and also appears at page one of the CMR.¹

12. Appearing below the last entry on page 44 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 481, 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.” There are no entries, handwritten or otherwise, appearing to the right of this heading, above, or otherwise. Appearing at the lower right area of page 44 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” Stamped over this instruction is the aforementioned March 3, 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, Philip Barretti, on March 3, 2015, as described. The record also includes petitioner’s New York State Nonresident and Part Year Income Tax Return (Form IT-203) as e-filed for the year 2013 (*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 “3 Robin Hill Road, North Caldwell, New Jersey, 07006.” This address consistently appears on the notice, the Request, the petition and the cover letter to the BCMS Dismissal Order.

15. The affidavit of Heidi Corina, a legal assistant in the Division's Office of Counsel, details her preparation and filing of a USPS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with respect to the Notice of Determination at issue in this matter. Filing USPS form 3811-A commences a process by which post-mailing return receipt delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the form 3811-A sought such information for the item mailed by the Division on March 3, 2015, under the certified mail number listed above (7104 1002 9730 0407 8780), to petitioner at his above-listed address (*see* Finding of Fact 11). USPS form 3811-A was provided by the Division to the Albany, New York, USPS General Mail Facility, 30 Old Karner Rd., Albany, NY, 12288. In response, the USPS confirmed delivery of the specified item of certified mail in question to petitioner at the specified address on March 5, 2015, at 2:59 p.m., and included the scanned signature image and hand-printed address (3 Robin Hill) of the recipient.

16. Petitioner did not respond to the Division's motion to dismiss or for summary determination.

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 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, 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 to dismiss under § 3000.9(a) of the Rules of Practice and Procedure (Rules) or for summary determination under § 3000.9(b). Since, as noted, the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition, the Division's motion for summary determination under § 3000.9(b) of the Rules is the proper vehicle to consider the timeliness of petitioner's Request, and this determination shall address the instant motion as such.

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 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 [3d Dept 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; Findings of Fact 6 through 11, 13). However, in this instance the submission of the CMR is not sufficient to establish that the Division’s standard mailing procedure was followed. That is, while the final page of the CMR (like the balance of its pages) bears the USPS March 3, 2015 postmark and initials of the postal clerk, there is no indication (or acknowledgment) of the number of pieces of mail actually received at the post office, as called for by the stamped instruction at the base of the page, and as

outlined as a specific instruction from the Division to the USPS per the Peltier affidavit (*see* Finding of Fact 12; *see also* Peltier affidavit at ¶ 5). Hence, the proof submitted establishes that items of mail were, in fact, delivered into the custody of the USPS. However, given the failure to comply with one of the specific steps outlined as part of its standard mailing procedure, without further explanation for that failure, the Division's submitted proof fails to establish the number of such items of mail so delivered to the USPS, or that any particular item of mail, including the Notice of Determination to be delivered to petitioner, was included therein. Hence, it cannot be concluded that the subject notice was properly mailed, as claimed, on March 3, 2015, and thus the period within which a protest could have been filed was not triggered as of such date.

H. Consideration of this matter does not end with the foregoing. That is, an inadequacy in the evidence of mailing, as above, may be overcome by evidence of delivery of the notice to the taxpayer (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). In such instances of failure to prove proper mailing of a statutory notice, the 90-day period for filing either a request or petition is tolled until such time as the taxpayer actually receives the notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file a protest will commence (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011), unless issuance of the notice itself is precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891 [1986], *rev'd* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. Notwithstanding the described evidentiary failure with regard to mailing, the Division has nonetheless established, via the Corina affidavit and the accompanying USPS Form 3811-A and USPS response thereto, that the notice was mailed by certified mail and was, in fact, thereafter

delivered to and accepted by petitioner on March 5, 2015 (*see* Finding of Fact 15). As a result, the period within which to challenge the Notice of Determination commenced to run on the March 5, 2015 date of such actual receipt, and in order to be timely, a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, had to have been filed within 90 days thereafter (*Matter of Agosto; Matter of Rosen*). In turn, 90 days after the March 5, 2015 date of actual receipt of the notice was June 3, 2015, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Here, petitioner's BCMS Request was not filed until February 4, 2016 (*see* Finding of Fact 2), a date that falls beyond the statutory period within which a timely protest had to have been filed. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Modica; Matter of Luckacs; Matter of Sak Smoke Shop*).

J. The Division's motion for summary determination is hereby granted, the February 19, 2016 Conciliation Order Dismissing Request is sustained, and the petition of Philip Barretti is denied.

DATED: Albany, New York
March 02, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE