

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MIGUEL URREGO : DETERMINATION
 : DTA NO. 827558
 :
for Revision of Determinations or for Refund of Sales
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2011 through August 31, 2012.

Petitioner, Miguel Urrego, 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 March 1, 2011 through August 31, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion on February 21, 2017, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Accompanying the motion was the affidavit of Adam Roberts, Esq., dated February 21, 2017, and annexed exhibits. Petitioner, appearing by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA), submitted a response on May 8, 2017, which began the 90-day period for issuance of this determination. Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition should be dismissed because it was not timely filed following the issuance of notices of determination and estimated determination.

FINDINGS OF FACT

1. On March 25, 2016, petitioner, Manuel Urrego, filed a petition with the Division of Tax Appeals in protest of the following notices of estimated determination issued by the Division of Taxation (Division) pursuant to Articles 28 and 29 of the Tax Law:

Notice Number	Tax Period Ended	Tax	Penalty	Interest	Balance Due
L-041123666	8/31/12	\$9,662.19	\$2,898.61	\$2,670.64	\$15,231.44
L-041123667	5/31/12	\$34,649.76	\$10,741.27	\$11,231.51	\$56,622.54
L-041123668	2/29/12	\$55,739.52	\$17,279.14	\$20,796.00	\$93,814.66
L-041123669	11/30/11	\$101,425.71	\$31,441.82	\$43,029.68	\$175,897.21

The petition also protested the following notices of determination issued pursuant to Articles 28 and 29 of the Tax Law:

Notice Number	Tax Period Ended	Tax	Penalty	Interest	Balance Due
L-041123670	8/31/11	\$9,662.21	\$3,043.48	\$4,664.04	\$17,369.73
L-041123671	5/31/11	\$33,649.77	\$10,589.76	\$17,938.51	\$62,178.04

Each of the above notices was dated May 1, 2014. The Division maintains that the notices were issued electronically pursuant to Tax Law § 35.

2. The subject notices were issued to petitioner as a responsible person for a company named Chef & Company, LLC, for the periods at issue.

3. In support of dismissal and to prove the issuance of the notices under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated February 21,

2017, of Adam Roberts, Esq.; (ii) an affidavit, dated February 21, 2017, of Monica Amell, Taxpayer Services Specialist 3 and Team Lead of the External Communication Unit of the Division; (iii) a copy of the Division's Online Services (OLS) Account Terms and Conditions for Individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email"; (v) a screenshot of petitioner's OLS "View Online Services Account"; (vi) correspondence dated September 20, 2011 from the Division to petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) the subject notices of estimated determination and notices of determination all dated May 1, 2014; (ix) a copy of petitioner's "Event Management Transaction Log" within the e-Manages Process for an Integrated Revenue Enterprise (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; (xi) the Division's printout of "Delivery Details by Template ID"; and (xii) the Division's printout of electronic message delivery status.

4. The affidavit of Monica Amell sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications, including electronic statutory notices. Ms. Amell has been Team Lead of the External Communication Unit of the Division since June 2013. As part of Ms. Amell's duties, she manages the processing and delivery of taxpayer specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. Taxpayers may open an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS

where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

5. The Division's OLS Account Terms and Conditions for Individuals provides that in consideration of a taxpayer's use of an OLS account, the taxpayer agrees that by providing electronic communication authorization, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

6. In the "manage email" section of an OLS account, an account holder must affirmatively opt-in to receiving tax bills and related statutory notices via electronic communication by checking a box labeled "Bills and Related Notices - Get emails about your bills." The account holder must then click on the "Save" button to register and records the account holder's authorization to receive same electronically. Immediately above the save button is an acknowledgment section which provides:

"By selecting one or more of the choices above and clicking **Save**:

- I agree to receive tax bills and similar account notices electronically at my online services account.
- I understand that I will no longer receive these communications via physical (postal) mail.
- I understand that my right to challenge bills received through my online

services account is the same as that for paper bills.”

7. Petitioner opened an OLS account with the Division on September 16, 2011 under his name, taxpayer identification number, and user identification number, using a Logon ID of “Mu**ego8” and an email address of “miguel@***.com.” Petitioner’s OLS account for this user identification number and email address remains active to date.¹

8. In the Manage Email section of petitioner’s OLS account described in Finding of Fact “6,” petitioner checked the boxes labeled “Bills and Related Notices - Get emails about your bills” and “Other Notifications - Get emails about refunds, filings, payments, account adjustments, etc.”

9. On September 20, 2011, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on September 16, 2011 under the username of “mu**ego8.”

10. The Division’s Advanced Function Presentation (AFP) system initiates billing printouts. The AFP system uses the Division’s DZ4010Z Retrieve View Data (RVD) program. The RVD program verifies email eligibility based on the Internal Taxpayer ID, tax type and billing form. The RVD program uses Internal Taxpayer ID, User ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

11. When a statutory notice is scheduled to be issued to a taxpayer under this procedure, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient’s OLS account and the message is displayed in the OLS

¹ The user identification and email address are partially redacted to preserve confidentiality.

Message Center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of “D” for delivered or “U” for undelivered.

12. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their Message Center upon logging in to the OLS. The statutory notice is viewable in the Message Center section of the taxpayer’s OLS account.

13. On May 1, 2014, the Division posted six messages stating, “You have a new liability due” to petitioner’s OLS account and sent corresponding email alerts to petitioner’s email address of miguel@***.com. Also on May 1, 2014, the Division posted notices of estimated determination numbers L-041123666 through L-041123669 and notices of determination numbers L-041123670 and L-041123671 to petitioner’s OLS account, which were stored in his OLS Message Center.

14. The Division maintains delivery status information of email alerts in the Delivery Details by Template ID (Delivery Details). The Delivery Details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address of miguel@***.com on May 1, 2014, with APL Tracking IDs MG050120149688486, MG050120149688498, MG050120149688501, MG050120149688502, MG050120149688504, and MG050120149688505. The Delivery Details indicate the status of the emails sent to petitioner on May 1, 2014 as “D” (delivered).

15. Attached to Ms. Amell’s affidavit is a printout of the status of messages sent to

petitioner's OLS account and email address. As explained by Ms. Amell, the status information reports a status of "R" for read and "U" for unread. The status printout relevant to the May 1, 2014 messages sent to petitioner indicates that messages APL Tracking IDs MG050120149688486, MG050120149688498, MG050120149688501, MG050120149688502, MG050120149688504, and MG050120149688505 delivered to petitioner's OLS account and email address had a status of "U" or unread.

16. Ms. Amell avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division's External Communication Unit on May 1, 2014.

17. In response to the Division's motion, petitioner, in an unsworn letter, denies receipt of the subject notices and alleges that the Division failed to meet its burden of proving that it emailed the alerts concerning the notices of determination and estimated determination to petitioner's last known email address. Petitioner has not argued that he changed his email address or updated his account from the time it was opened until the date the notices were alleged to have been issued.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of determination or estimated 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 for a conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (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. Where the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. While Tax Law § 1138 requires the mailing of a notice of determination or estimated determination by certified or registered mail to the taxpayer's last known address, Tax Law § 35 provides for an alternative method of issuing a notice by means of electronic communication. Specifically, Tax Law § 35 provides as follows:

"Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute

appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”

D. In accordance with Tax Law § 35, the Division furnished the notices of determination and estimated determination to petitioner by use of electronic means of communication. The Division has established that it obtained petitioner’s authorization, as an OLS account holder, to furnish such notices electronically. Specifically, the Division has proven, through the affidavit of Monica Amell and the documentary evidence attached thereto, its standard procedure for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders.

The Division has also established through the affidavit and documentary evidence 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). The evidence shows that petitioner established an OLS account on September 16, 2011, under his name and identification number, using a username of “mu**ego8” and an email address of “miguel@***.com.” On September 20, 2011, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of “mu**ego8”. The evidence also establishes that petitioner authorized the Division to send notices electronically by checking the box within his OLS account, Manage Email section, which indicates his agreement to receive email regarding bills, notices and other notifications. Pursuant to the petitioner’s authorization for electronic communication, petitioner agreed to receive the indicated documents and communications electronically rather than by mail.

The Division has also offered proof sufficient to establish that the statutory notices were furnished to petitioner by means of electronic communication on May 1, 2014 to his OLS

account with alerts sent to his email address. Specifically, the Division's records show that six email alerts were sent to petitioner's updated email address and the six subject notices were posted to petitioner's OLS account and stored in his OLS Message Center on May 1, 2014. The email alerts sent to petitioner's email address advised him that "you have a new liability due," alerting him to view the statutory notices posted in the Message Center of his OLS account. The Division's records further show the delivery status of the May 1, 2014 emails as "D" (delivered). Based on the foregoing, it is determined that the Division has presented sufficient records to establish that it furnished the subject notices of determination and estimated determination on May 1, 2014 by use of electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof.

E. Petitioner's assertion that the Division's motion fails as the Division failed to meet its burden of proving that it emailed the alerts concerning the notices of determination and estimated determination to petitioner's last known email address is rejected. Tax Law § 35 provides that where the Division "has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation." Nowhere in Tax Law § 35 is there a requirement that the Division mail an alert to the petitioner's last known email address and such a requirement cannot be read into such section. If petitioner is alleging that he changed his email address on his OLS account prior to the notices being issued, it was incumbent upon him to make that showing. There has been no such showing.

F. It is thus concluded that the Division properly furnished the notices of determination and estimated determination by means of electronic communication on May 1, 2014, pursuant to

Tax Law § 35, and 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[b]).

G. Petitioner's petition challenging said notices was not filed until March 25, 2016, or in excess of 90 days from issuance of the notices. Consequently, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider the merits.

H. The Division's motion for summary determination is hereby granted and the petition of Miguel Urrego is dismissed.

DATED: Albany, New York
August 3, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE