

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THOMAS DIBACCO : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 827734
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 2010 through May 31, 2014. :

Petitioner, Thomas DiBacco, 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, 2010 through May 31, 2014.

On October 7, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of Justine Clarke Caplan, Esq., dated October 7, 2016, and annexed exhibits supporting the motion.

Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion.

Accordingly, the 90-day period for issuance of this determination began on November 7, 2016, the due date for petitioner's response.¹ After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

¹ Since November 6, 2016 fell on a Sunday, petitioner had until Monday, November 7, 2016 to file a response to the Division of Taxation's motion for summary determination (*see* General Construction Law § 20).

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 Division of Taxation (Division) issued to petitioner, Thomas DiBacco, Notice of Determination L-044132428, dated December 23, 2015, which asserted sales and use taxes due in the amount of \$459,842.25, plus interest for the period September 1, 2010 through May 31, 2014. This notice is addressed to “DIBACCO-THOMAS 1800 WEAKFISH WAY P C BEACH, FL 32408-7234.” The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0708 1862. This notice was issued because petitioner was determined to be an officer or responsible person of Bookit.com, Inc.

2. Subsequently, on April 8, 2016, the Division issued to petitioner a Notice and Demand for Payment of Tax Due (assessment identification number L-044132428) for sales and use taxes due for the period September 1, 2010 through May 31, 2014.

3. Petitioner filed a Request for Conciliation Conference (Request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of the Notice and Demand for Payment of Tax Due, assessment identification number L-044132428. Petitioner hand-dated and signed the Request on April 14, 2016. On this Request, petitioner’s address is listed as 1800 Weakfish Way, Panama City, FL 32408. The Request was faxed to and received by BCMS on April 27, 2016.

4. On May 13, 2016, BCMS issued a Conciliation Order Dismissing Request (Dismissal Order) to petitioner. Bearing CMS No. 270379 and referencing notice number L-044132428, the Dismissal Order determined that petitioner’s protest 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 December 23, 2015, but the request was not received until April 27, 2016, or in excess of 90 days, the request is late filed.”

5. On June 30, 2016, the Division of Tax Appeals received a petition, dated June 27, 2016, seeking revision of Notice of Determination L-044132428, and reconsideration of the Dismissal Order. The petition was sent by FedEx Express shipping on June 28, 2016. There is no dispute that the petition was filed within 90 days after the May 13, 2016 issuance of the Dismissal Order, and constitutes a timely challenge thereto. Petitioner’s petition lists his address as “1800 Weakfish Way.” The petition addresses the merits of the assessment under protest, not the timeliness of the Request.

6. In support of the motion and to prove the proper and timely mailing of the Notice of Determination under protest, the Division submitted the following: (i) an affidavit, dated October 7, 2016, of Justine Clarke Caplan, Esq., the Division’s representative; (ii) an affidavit, dated September 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated December 23, 2015; (iv) an affidavit, dated September 22, 2016, of Bruce Peltier, store and mail operations supervisor in the Division’s mail room; (v) a Notice of Determination, dated December 23, 2015, and the accompanying mailing cover sheet; (vi) a copy of petitioner’s Request for Conciliation Conference, dated April 14, 2016; (vii) a copy of the Conciliation Order Dismissing Request, dated May 13, 2016; (viii) a copy of the petition, dated June 27, 2016, with attached documents, and a copy of the FedEx Express envelope in which the petition was shipped; (ix) a copy of a Form DTF-17 Application to Register for a Sales Tax Certificate of Authority for Bookit.com

Enterprises filed January 23, 2015; and (x) a printout entitled “Look Up a ZIP Code™” from the U.S. Postal Service website (USPS.com®).

7. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs and is familiar with the Division’s Case and Resource Tracking System (CARTS) and the Division’s past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of 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 the actual mailing date of “12/23/15.” It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

8. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the taxpayer’s mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control numbers are also listed on the CMR under the heading “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. 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.”

9. Ms. Nagengast attested to the truth and accuracy of the copy of the 228-page CMR, which contains a list of 2,503 statutory notices issued by the Division on December 23, 2015. The CMR lists 2,503 computer-printed certified control numbers along with corresponding assessments numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 228, which contains 6 such entries. Ms. Nagengast noted that portions of the CMR that were attached to the affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding.

10. Page 217 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0708 1862 and reference number L-044132428, was issued to “DIBACCO-THOMAS,” at the 1800 Weakfish Way, P C Beach, Florida, address listed thereon. The corresponding mailing cover sheet, attached to the Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name and address as noted above.

11. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage and fee amounts 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 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.

12. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, the postal employee did affix a USPS postmark to every page of the CMR, but it is barely legible on nine pages of the CMR. However, the postmark dated December 23, 2015 of the USPS General Mail Facility Albany, New York, is legible on page 217, the page on which information concerning the subject Notice of Determination and Thomas DiBacco's name and address appear, and the last page of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by writing the number "2503" on the last page of the CMR next to "TOTAL PIECES RECEIVED AT POST OFFICE," and writing his or her initials near the handwritten number.

13. Mr. Peltier's affidavit states that 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 Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

14. Based upon his review of the affidavit of Mary Ellen Nagengast, the exhibits attached thereto and the CMR, Mr. Peltier avers that on December 23, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to "DIBACCO-THOMAS, 1800 WEAKFISH WAY, P C BEACH, FL 32408-7234 to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail." He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on

December 23, 2015 to be kept as part of the records of the Division. Mr. Peltier asserts that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to Thomas DiBacco on December 23, 2015.

15. The record includes a copy of a Form DTF-17 Application to Register for a Sales Tax Certificate of Authority for Bookit.com Enterprises filed on January 23, 2015 by petitioner as responsible person. Review of Bookit.com Enterprises' Form DTF-17, Section K - Business Contacts and Responsible Person, indicates that petitioner was "CFO" of Bookit.com Enterprises, and that his home address was "1800 Weakfish Way, Panama City Beach, FL 324087234." This was the last application filed by Mr. DiBacco prior to the issuance of the subject Notice of Determination.

16. Attachment six to Ms. Clarke Caplan's affidavit is a printout entitled "Look Up a ZIP Code™" from the USPS website, which shows that the zip code "32408" was entered to get the cities in that zip code. The result of such entry indicates that the default city in zip code 32408 is Panama City, Florida, and the other city names recognized for addresses in that zip code are P C Beach, Florida, and Panama City Beach, Florida.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29 of the Tax Law. A taxpayer may file a petition with the Division of Tax Appeals seeking a 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]). It is

well established that the 90-day 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 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 for conciliation conference in protest of the subject Notice of Determination, rather than a petition, 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* Finding of Fact 5; Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]).

C. The Division has filed alternate motions, seeking dismissal under 20 NYCRR 3000.9(a), or summary determination under 20 NYCRR 3000.9(b). As the Division of Tax Appeals has subject matter jurisdiction on the issue of the timely filing of a request for a conciliation conference in the instant matter (*see* Finding of Fact 5), the Division's motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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 and 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 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 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 determination 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 a material fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [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]).

E. In the instant matter, petitioner did not respond to the Division’s motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged by the Nagengast and Peltier affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division’s motion will be granted for the reasons set forth below.

F. 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 the subject 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*).

G. 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]).

H. 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, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

I. While each page of the 228-page CMR lists certified control numbers with

corresponding notice numbers, names and addresses, it does not contain legible postmarks on each page, indicating the mailing date of December 23, 2015 (*see* Finding of Fact 12). However, the last page of the CMR bears a USPS postmark dated December 23, 2015. In addition, a postal service employee wrote the number “2503” next to the “TOTAL PIECES RECEIVED AT POST OFFICE” heading and initialed the last page, thereby indicating that all 2,503 pieces of mail listed on the CMR were received at the post office. The notice addressed to Thomas DiBacco was among the 2,503 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

J. Tax Law § 1138(a)(1) provides that a notice of determination “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. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

K. As noted in Finding of Fact 15, petitioner’s address was listed as 1800 Weakfish Way, Panama City Beach, FL 324087234 on Bookit.com Enterprises’ Application to Register for a Sales Tax Certificate of Authority, which was filed by petitioner, as responsible person, on January 23, 2015. Petitioner’s address listed on the subject Notice of Determination was 1800 Weakfish Way, P C Beach, FL 32408-7234. The Division has established that P C Beach, FL is one of the city names recognized by the USPS for addresses in zip code 32408 (*see* Finding of

Fact 16). As for the Division's insertion of a hyphen separating the first five digits of the zip code from the last four digits, I find the addition of the hyphen to be inconsequential. As such, it is determined that the Division has established that it properly mailed the Notice of Determination to petitioner's last known address (Tax Law §§ 1138[a][1]; 1147[a][1]).²

It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a Request with BCMS or a petition with the Division of Tax Appeals commenced on December 23, 2015 (Tax Law §§ 170[3-a][a]; 1138[a][1]).

L. In order to timely protest the Notice of Determination issued on December 23, 2015, petitioner was required to file a petition or request for a conciliation conference within 90 days of December 23, 2015, i.e., on or before March 22, 2016. Petitioner's Request was not filed until it was received by BCMS on April 27, 2016 (*see* Finding of Fact 3), a date beyond the statutory period within which a timely protest had to have been filed, and thus was not timely filed. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft* [a petition was dismissed because it was filed one day late].)

M. The Division of Taxation's motion for summary determination is hereby granted, the May 13, 2016 Conciliation Order Dismissing Request is sustained and the petition of Thomas DiBacco is denied.

DATED: Albany, New York
January 26, 2017

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

² Even if there was a zip code discrepancy, the use of an incorrect zip code is an inconsequential error and thus does not result in a failure to comply with the last known address requirement of Tax Law § 1138(a)(1) (*Matter of Karolight, Ltd.*, Tax Appeals Tribunal, July 30, 1992).