

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANGEL SARMIENTO : DETERMINATION
 : DTA NO. 828059
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 June 1, 2012 through February 28, :
2014. :
_____ :

Petitioner, Angel Sarmiento, 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 June 1, 2012 through February 28, 2014.

On March 10, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Both parties having been granted an extension of time to file a response, petitioner, appearing by Glenn H. Ripa, Esq., filed a response on May 23, 2017. On May 22, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Howard S. Beyer, Esq., of counsel), submitted an affidavit and documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 25, 2017. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. On February 1, 2017, petitioner, Angel Sarmiento, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a notice of determination, assessment number L-043736691-9, which was not attached to the petition as originally filed. After correspondence with petitioner, the notice was obtained from the Division of Taxation (Division) and thereafter provided to the Division of Tax Appeals to be associated with the petition.

2. The subject notice of determination, dated September 29, 2015, was addressed to petitioner at 3244 99th Street, Apt. 1, East Elmhurst, New York 11369-1831.

3. On March 10, 2017, the Supervising Administrative Law Judge of the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of a notice of determination issued to petitioner on September 29, 2015, and that the petition was not filed until February 1, 2017, or 491 days later, and was thus, untimely.

4. In response to the issuance of the notice of intent to dismiss petition and to prove mailing of the notice under protest, the Division submitted the following: (i) an affidavit, dated April 19, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 29, 2015; (iii) an affidavit, dated April 25, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room since April 2010; (iv) an affidavit, dated April 26, 2017, of Heidi Corina, a Legal Assistant 2 of the Division, a position she has held since April 2005; (v) a copy of the September 29, 2015 notice with the associated mailing cover sheet addressed to petitioner; (vi) a copy of a warrant, bearing a docketed date of April 12, 2016, issued to petitioner "individually and as a responsible

person of Sabor Y Rumba Inc.,” bearing a mailing address of 6044 56th St., Apt 2R, Maspeth, New York 11378-3602, concerning assessment L-043736691-9 for the period ending February 28, 2014; and (vii) a copy of petitioner’s electronically filed New York Resident Income Tax Return, Form IT-201, for tax year 2013, dated May 9, 2014, bearing the address of 3244 99th Street, Apt. 1, East Elmhurst, New York 11369, the same address for petitioner as that listed on the subject notice.

5. 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 are 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 page of the CMR in the present case to the actual mailing date of “9/29.”¹ In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain

¹ As set forth in the Nagengast affidavit, in the upper left hand corner of Page 1 of the CMR and on each subsequent page of the CMR is the run, which signifies the date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of “20152651700” was the date and time that the entire certified mail record was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the statutory notices to ensure that there is sufficient lead time for the notices to be manually reviewed and processed by the Division’s mail room. The run date signifies it was printed on the 265th day of 2015, or September 22, 2015. Given the relationship of the run date to the handwritten date, and taking into account the postmark on each page of the CMR, it is concluded that the handwritten date of “9/29” was intended to refer to September 29, 2015.

so when returned to the Division, 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.

6. 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 mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "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 PO Address."

7. The CMR in the present matter consists of 473 cut sheet pages and lists 5,194 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 473, which contains 2 entries. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

8. Each notice is placed in an envelope by Division personnel and delivered into the possession of a USPS representative, who then affixes his or her initials or signature and/or a U.S. postmark to a page or pages of the CMR. In this case, a USPS representative affixed a USPS postmark to each page of the CMR dated September 29, 2015, wrote his or her initials on page 473, and wrote the number "5194" on page 473 next to the heading "Total Pieces Received at Post Office."

9. Page 292 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0589 8677 and assessment number L-043736691, was mailed to

petitioner at the East Elmhurst, New York, address listed on the subject notice. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Melissa Kate Koslow describes the Division's mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 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 initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated September 29, 2015, on each page of the CMR, and initialed the last page of the CMR. The mailroom further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Here, the USPS employee complied with this request by writing the number "5194" on the last page next to the heading "Total Pieces Received at Post Office."

11. Based upon her review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Koslow stated that on September 29, 2015, an employee of the mail room delivered one piece of certified mail addressed to petitioner, "SARMIENTO-ANGEL, 3244 99TH ST. APT 1, EAST

ELMHURST, NY 11369-1821,” to a branch of the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on September 29, 2015.

12. Heidi Corina is a Legal Assistant 2 in the Division’s Office of Counsel. As part of her duties, Ms. Corina prepares USPS Form 3811-A, or makes a request of the Division’s mail room staff that the form be prepared. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The USPS will provide whatever information it has concerning delivery when delivery can be confirmed.

13. Attached to Ms. Corina’s affidavit is a copy of the Form 3811-A that was requested for petitioner regarding the notice mailed on September 29, 2015. This form requests information regarding a piece of mail bearing article number 7104 1002 9730 0589 8677² and addressed to petitioner at 3244 99th St., Apt. 1, East Elmhurst, NY 11369-1831. Also attached to Ms. Corina’s affidavit is the USPS’s response to the Form 3811-A request, a letter on USPS letterhead dated March 27, 2017. The letter refers to the certified mail number item and states in part: “The delivery record shows that this item was delivered on October 1, 2015 at 3:04 pm in EAST ELMHURST, NY 11369.” The letter contains a scanned image of the signature of the

² This is the same number as the certified number on the CMR corresponding with the mailing of the notice of determination to petitioner on September 29, 2015.

recipient, which is not legible, and a scanned image of the address of the recipient, which Ms. Corina identifies as a part of petitioner's East Elmhurst address, i.e., "3244 99."

14. According to the Division's records, petitioner's 2013 income tax return was filed on June 3, 2014, and was the last return filed by petitioner prior to the issuance of the notice in issue. The Division's records do not reflect the filing of an income tax return by petitioner for tax year 2014. Petitioner has not offered any evidence to the contrary.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner argues that the Division did not mail the notice in issue to petitioner's last known address, and that petitioner never received a copy of the notice. Petitioner maintains the following:

"... [petitioner] had not lived at 3244 99th Street, Apt 1 East Elmhurst NY 11369 the address reflected in the attached Notice of Determination for quite some time prior to the date of the notice and New York State Department of Taxation & Finance knew or should have known that at said time, Angel Sarmiento was residing at 6044 56th St Apt 2R, Maspeth, NY 11378 which is the address where the New York State Department of Taxation & Finance mailed their attached Tax Warrant a few month [sic] later."

16. The Division maintains that the notice was properly mailed to petitioner on September 29, 2015, and that petitioner's protest was simply untimely, leaving the Division of Tax Appeals without jurisdiction to review the notice.

CONCLUSIONS OF LAW

A. This determination, made pursuant to the notice of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of a determination in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion "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.”

B. 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 date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 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).

C. Where, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

D. In this matter, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner's last known address on September 29, 2015. The CMR has 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). The affidavits submitted by the Division adequately describe the Division's general mailing procedure, as well as the relevant CMR, and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's Form IT-201 filed for 2013, on or about June 3, 2014, which satisfies the "last known address" requirement.

In addition, the Division has introduced further support that the notice was delivered to petitioner's last known address through the affidavit of Ms. Corina, the request for delivery information and the USPS response. The USPS response clearly lists the certified mail number of the particular document and the city to which the item of mail was delivered, i.e., East Elmhurst. It is thus concluded that the Division properly mailed the notice on September 29, 2015, 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[a][1]).

E. Petitioner's argument as to the Division's failure to mail the notice to his last known address is not supported by the record. The warrant was docketed by the Division over 6 months after the issuance of the notice of determination, on April 12, 2016, and bore petitioner's Maspeth, New York, address. However, given the time lapse between the two documents, the issuance of the warrant to petitioner's Maspeth address does not prove that the Division knew or should have known that petitioner no longer resided at the East Elmhurst address at the time the

notice was issued. The last return filed by petitioner prior to the issuance of the subject notice was his 2013 personal income tax return on or about June 3, 2014, and absent a notification otherwise, the Division properly used the East Elmhurst address for the issuance of the notice. Had petitioner filed a 2014 personal income tax return with his Maspeth address prior to the issuance of the notice in September 2015, the Division would have been required to use that location as petitioner's last known address. Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Contrary to petitioner's argument of non-receipt of the notice, the proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. Petitioner's protest was not filed until February 1, 2017, or 491 days later than issuance of the statutory notice. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*see Matter of Sak Smoke Shop*).

G. The petition of Angel Sarmiento is dismissed.

DATED: Albany, New York
August 17, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE