

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TIMES SQUARE RESTAURANT GROUP, LTD. : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 828119
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 2010 through May 31, 2015. :

Petitioner, Times Square Restaurant Group, Ltd., 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, 2010 through May 31, 2015.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), brought a motion, dated September 26, 2018, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Akerman LLP (Alvan L. Bobrow, Esq.), filed a response to the Division of Taxation's motion on October 29, 2018, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits 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 petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of a determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a notice of determination, dated August 5, 2016, and bearing assessment identification number L-045319403 (notice). The notice is addressed to petitioner, Times Square Restaurant Group, Ltd., at an address in New Rochelle, New York.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was filed with BCMS on November 7, 2016.

3. On December 2, 2016, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice 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(s) was issued on August 5, 2016, but the request was not mailed until November 7, 2016, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on March 2, 2017.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit, dated September 17, 2018, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments

Receivable” (CMR) postmarked August 5, 2016; (iii) an affidavit, dated September 18, 2018, of Fred Ramundo, a supervisor in the Division’s mail room; (iv) a copy of the notice with the associated mailing cover sheets addressed to petitioner and its representative; (v) a copy of petitioner’s request for conciliation conference, filed with BCMS on November 7, 2016 (BCMS request); (vi) a copy of petitioner’s electronically filed 2015 Request for Six-Month Extension to File New York S Corporation Franchise Tax Return (form CT-5.4), filed on March 11, 2016, which lists the same address for petitioner as that listed on the notice, the BCMS request, and the petition, and was the last return filed with the Division by petitioner before the notice was issued; and (v) a power of attorney for Alvan Bobrow, which was on file with the Division when the notice was issued.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 “8/5/16.” In addition, as described by Ms. Picard, 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 so when returned to the Division. 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.

7. 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."

8. The CMR in the present matter consists of 11 pages and lists 117 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 11, which contains 7 entries. Ms. Picard 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. A USPS representative affixed a postmark, dated August 5, 2016, to each page of the CMR, wrote and circled the number "117" on page 11 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 11.

9. Page one of the CMR indicates that a notice with certified control number 7104 1002 9730 0021 4816 and reference number L-045319403 was mailed to petitioner's representative, Alvan Bobrow, at the Broadway, New York, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and Mr. Bobrow's name as well as his firm name, Mayer Brown LLP, and address as noted. Page one of the CMR also indicates that a notice with certified control

number 7104 1002 9730 0021 4854 and reference number L-045319403 was mailed to petitioner at the New Rochelle, New York, address listed on the notice. The corresponding mailing cover sheet, also attached to the Picard affidavit as exhibit "B," bears this same certified control number and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo describes the Division's mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Ramundo 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 listed 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. The mail room 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. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark of August 5, 2016. On page 11, corresponding to "Total Pieces and Amounts," is the preprinted number 117 and next to "Total Pieces Received At Post Office" is the handwritten and circled entry "117." There is a set of initials or a signature on page 11.

11. According to both the Picard and Ramundo affidavits, copies of the notice were mailed to petitioner and its representative on August 5, 2016, as claimed.

12. Petitioner's late filed response to the Division's motion alleges that the notice was not sent to the correct address for petitioner's representative.¹ Petitioner's response is not in the form of an affirmation from its representative nor an affidavit from one with personal knowledge of the facts. Instead petitioner has submitted a memorandum with legal argumentation combined with various allegations of fact. Attached to the response is page 1 of the August 5, 2016 CMR referenced in findings of fact 5 through 11 and a consent extending the statute of limitations for an unrelated taxpayer that Mr. Bobrow represents. The consent is addressed to Mr. Bobrow at Mayer Brown at a different street address in Manhattan than that listed on the mailing cover sheet referenced in finding of fact 9. According to Mr. Bobrow, this exhibit reflects the correct mailing address as Mayer Brown had moved prior to the notice being issued and the Division was aware of the correct address.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order (*see* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a 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 conciliation conference. This determination shall address the instant motion as such.

¹ Petitioner's response, although filed late, has been accepted as there is no ensuing prejudice to the Division in considering the arguments raised therein, and the Division has raised no objection to the acceptance of the late-filed response.

B. 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]).

C. 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, Inc. 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]). “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*).

D. 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 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 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).

E. 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).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on August 5, 2016. 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 2015 CT-5, filed with the Division on March 11, 2016, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice on August 5, 2016, 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]).

G. Petitioner's late filed response to the Division's motion alleges that, although the CMR and corresponding notice cover letters indicate that a copy of the notice was mailed to petitioner's representative, the address used was inaccurate. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988 *citing Matter of Bianca v Frank*, 43 NY2d 168 [1977]). However, petitioner has offered argument, but no supporting proof in admissible form that the Division was aware that petitioner's representative's address had changed at the time the notice was issued. Petitioner's response also claims that because the CMR lists only the representative's name, Alvan Bobrow, and not the firm name, Mayer Brown, the address is again improper. While the firm name is omitted from the CMR, it is listed directly under Mr. Bobrow's name on the corresponding cover letter, and as Mr. Ramundo has attested, would have been displayed in the windowed envelope in which the notice was mailed.

H. Petitioner's request for conciliation conference was filed on November 7, 2016. This date falls after the 90-day period of limitations for the filing of such a request. Consequently, the

request was untimely (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [b]) and the same was properly dismissed by the December 2, 2016 order issued by BCMS. Petitioner has offered no admissible evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired.

I. The Division's motion for summary determination is hereby granted, the petition is denied, and the December 2, 2016 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
January 24, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE