

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHARON FORSTADT : DETERMINATION
: DTA NO. 828124
for Revision of a Determination or for Refund of Sales and :
Uses Taxes under Articles 28 and 29 of the Tax Law for :
the period December 1, 2006 through May 31, 2008. :
:

Petitioner, Sharon Forsdadt, 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, 2006 through May 31, 2008.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), brought a motion dated September 29, 2017 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On October 24, 2017, petitioner, appearing by Robert S. Lisch, E.A., submitted documents in opposition to summary determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleading and documents submitted in connection with this matter, Barbara J. Russo, 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 notices of estimated determination and notices of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of the following notices of estimated determination, dated November 15, 2007, and notices of determination, dated February 17, 2009:

Notice #	Tax Period Ended	Notice Date
L-029440470	2/28/07	11/15/07
L-029440469	5/31/07	11/15/07
L-031572241	8/31/07	2/17/09
L-031572240	11/30/07	2/17/09
L-031572239	2/29/08	2/17/09
L-031572238	5/31/08	2/17/09

2. Petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the November 15, 2007 and February 17, 2009 notices. The request was postmarked December 1, 2016 and received by BCMS on December 5, 2016.

3. On December 16, 2016, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notices of estimated determination and notices of determination 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 notices were issued on November 15, 2007 and February 17, 2009, but the request was not mailed until December 1, 2016, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order dismissing request on March 10, 2017.

5. To show proof of proper mailing of the notices of estimated determination, numbers L-029440470 and L-029440469, both dated November 15, 2007, the Division provided the following with its motion papers: (i) an affidavit, dated September 18, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked November 15, 2007; (iii) an affidavit, dated September 21, 2017, of Fred Ramundo, a Stores and Mail Operations Supervisor in the Division's mail room, (iv) copies of the November 15, 2007 notices of estimated determination with the associated mailing cover sheets; (v) a copy of petitioner's request for conciliation conference, postmarked on December 1, 2016 and; (vi) petitioner's 2006 New York resident income tax return, dated March 5, 2007, which lists the same address for petitioner as that listed on the subject notices of estimated determination. The 2006 income tax return was the last return filed with the Division by petitioner before the notices of estimated determination were issued.

6. To show proof of proper mailing of the notices of determination, numbers L-031572241, L-031572240, L-031572239 and L-031572238, all dated February 17, 2009, the Division provided the following with its motion papers: (i) an affidavit, dated September 18, 2017, of Deena Picard; (ii) pages 1-50; 52-773; 776-1,511; 1,513-2,008; and 2,010-2,012 of a CMR, each postmarked February 17, 2009; (iii) an affidavit, dated September 21, 2017, of Fred Ramundo; (iv) copies of the February 17, 2009 notices of determination with the associated mailing cover sheets; (v) a copy of petitioner's request for conciliation conference, postmarked on December 1, 2016 and; (vi) petitioner's 2007 New York resident income tax return, dated March 23, 2008, which lists the same address for petitioner as that listed on the subject notices of

determination and the petition. The 2007 income tax return was the last return filed with the Division by petitioner before the notices of determination were issued.

7. The affidavits of Deena Picard, who has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and has been Acting Director of MAPS since May 2017, set 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 CMRs, in the present case, to the actual mailing dates of "11/15/07" and "2/17/09." 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. According to Ms. Picard, 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 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."

9. The November 15, 2007 CMR consists of 27 pages and lists 296 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 27, which contains 10 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 November 15, 2007 to each page of the CMR, and circled the preprinted number "296" on page 27 next to the heading "Total Pieces And Amounts."

10. Page 16 of the November 15, 2007 CMR indicates that notices of estimated determination with certified control numbers 7104 1002 9730 0468 3939 and 7104 1002 9730 0468 3946, and reference numbers L-029440469 and L-029440470, respectively, were mailed to petitioner at the Merrick, New York, address listed on the subject notices of estimated determination. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and petitioner's name and address as noted.

11. According to the Picard affidavit, the February 17, 2009 CMR consists of 2,012 pages and lists 22,121 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard states that each page of the CMR includes 11 such entries with the exception of page 2,012, which contains zero 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. Ms. Picard states that a USPS

representative affixed a postmark dated February 17, 2009 to each page of the CMR, and handwrote the number “22,121” below the preprinted “22,121” on page 2,012 next to the heading “Total Pieces Received at Post Office.” As noted, the Division introduced only pages 1-50, 52-773, 776-1,511, 1,513-2,008 and 2,010-2,012 of the CMR dated February 17, 2009.

12. Pages 1,242 and 1,243 of the February 17, 2009 CMR indicate that notices of determination with certified control numbers 7104 1002 9730 1195 3315, 7104 1002 9730 1195 3322, 7104 1002 9730 1195 3339 and 7104 1002 9730 1195 3346, and reference numbers L-031572238, L-031572239, L-031572240 and L-031572241, respectively, were mailed to petitioner at the Merrick, New York, address listed on the subject notices of determination. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear these certified control numbers and petitioner’s name and address as noted.

13. Each of the affidavits of Fred Ramundo, a supervisor in the mail room since 2013 and currently a Stores and Mail Operations Supervisor, describes the mail room’s general operations and procedures. Mr. Ramundo attests that he is familiar with the Division’s present and past office procedures as related to statutory notices, and that these procedures have remained essentially unchanged since approximately 1992. The mail room 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 retrieves 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 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 the

information contained on the CMR. Each of the CMRs has been stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” 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. A review of page 27 of the November 15, 2007 CMR indicates that the USPS employee complied with this request by circling the number of pieces received and initialing the same. The February 17, 2009 CMR reveals that the USPS employee complied with this request by writing the number of pieces received, 21,121, and initialing the same.

14. According to the Picard and Ramundo affidavits, copies of the subject notices were mailed on the dates indicated as claimed.

CONCLUSIONS OF LAW

A. 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]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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 [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*).

C. 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 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).

D. 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).

E. Here, with respect to subject notices of estimated determination, numbers L-029440470 and L-029440469, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on November 15, 2007. 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 2006 resident income tax return, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices of estimated determination, numbers L-029440470 and L-029440469, on November 15, 2007, 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]).

F. Petitioner's request for conciliation conference was filed on December 1, 2016. With respect to notice numbers L-029440470 and L-029440469, 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 §§ 170 [3-a] [b]; 1138 [a] [1]) and the same was properly dismissed by the December 16, 2016 Order issued by BCMS. Petitioner has offered no evidence to meet her burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notices expired.

G. The same does not hold true, however, for notices of determination numbers L-031572241, L-031572240, L-031572239 and L-031572238. The Picard and Ramundo affidavits establish the Division's current standard mailing procedure. In this case, however, the Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notices. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Exhibit "A" of the Picard affidavit contains a selection of pages (*see* Findings of Fact 6 and 13) of what purports to be a 2,012 page computer-generated CMR. Unlike in the procedure described in the Picard affidavit, the selection of pages in exhibit "A" are not physically connected, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 2,012 has been changed to February 17, 2009, but remains unchanged on the other provided pages. Pages 1 and 2,012, therefore, bear a different date than pages 1,242-1,243, where the subject notices are

listed. As a result, the partial CMR submitted as exhibit “A” of the Picard affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Accordingly, the Division’s motion for summary judgment is denied with respect to notice numbers L-031572241, L-031572240, L-031572239 and L-031572238, petitioner’s protest for these notices will be severed from this matter, assigned a separate Division of Tax Appeals case number, and proceed accordingly.

H. The Division of Taxation’s motion for summary determination is granted and the petition is denied with respect to Notices of Estimated Determination numbers L-029440470 and L-029440469, as indicated in Conclusion of Law F. The Division’s motion for summary determination is denied, without prejudice to renewal, with respect to Notices of Determination numbers L-031572241, L-031572240, L-031572239 and L-031572238, and petitioner’s protest of those notices will be assigned a separate Division of Tax Appeals case number, as indicated in Conclusion of Law G.

DATED: Albany, New York
January 18, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE