

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ABDUL A. SHAMIM	:	DETERMINATION
	:	DTA NO. 828142
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 March 1, 2012 through February 28, 2014.	:	

Petitioner, Abdul A. Shamim, 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 March 1, 2012 through February 28, 2014.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Michael Hall), brought a motion, dated August 28, 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) (1) (ii) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Arthur Morrison, Esq., did not respond to the Division of Taxation's motion by the due date of September 27, 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 petition with the Division of Tax Appeals following the issuance of a notice 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 a notice of determination, dated September 30, 2016, and bearing assessment identification number L-045494569 (notice). The notice was addressed to petitioner at an address in Woodside, New York.

2. Petitioner filed a petition with the Division of Tax Appeals in protest of the notice on March 30, 2017.

3. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit, dated April 11, 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 September 30, 2016; (iii) an affidavit, dated April 25, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the September 30, 2016 notice with the associated mailing cover sheet addressed to petitioner; (v) an affidavit, dated only August 2018, of Robert Bedard, a Tax Compliance Agent II of the Division's Civil Enforcement Division (CED) with attachments; (vi) a copy of petitioner's electronically filed 2015 New York resident income tax return, filed on February 22, 2016, which lists the same address for petitioner as that listed on the notice and the petition. The 2015 income tax return was the last return filed with the Division by petitioner before this notice was issued.

4. 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 pages of the CMR in the present case to the actual mailing date of "9/30/16." 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.

5. 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."

6. The CMR in the present matter consists of 17 pages and lists 177 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 17, which lists 1 entry. 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 September 30, 2016 to each page of the CMR, wrote and circled the number "177" on page 17 next to the heading "Total Pieces Received at Post Office" and initialed or signed page 17.

7. Page 9 of the CMR indicates that a notice with certified control number 7104 1002 9730 0033 5849 and reference number L-045494569 was mailed to petitioner at the Woodside, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this same certified control number and petitioner's name and address as noted. The Woodside, New York, address for petitioner is the same address used by petitioner on his 2015 income tax return, filed with the Division on February 22, 2016, and on his petition.

8. The affidavit of Fred Ramundo describes the Division's mail room's general operations and procedures. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. 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 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 Division 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. As noted, each of the 17 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark dated September 30, 2016. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's writing and circling "177" on the last page of the CMR (page 17), and the employee's initialing of that page indicate that all of the 177 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on September 30, 2016.

9. According to the Picard and Ramundo affidavits, a copy of the notice was mailed on the date indicated, as claimed.

10. The affidavit of Robert Bedard, who has been employed with the Division for approximately twelve years, describes his review of the Division's computer records, based on his personal knowledge and use of the Division's computer record keeping systems, to wit: CARTS and e-Managed Processes for an Integrated Revenue Enterprise (e-MPIRE). Based on his review, Mr. Bedard ascertained that, on October 21, 2016, the Division received an incomplete power of attorney (POA) attempting to appoint Irina Herman, CPA, as petitioner's representative. Upon receipt, the Division contacted Ms. Herman and requested a corrected POA. Subsequently, on October 24, 2016, Ms. Herman filed a corrected POA with the Division.

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). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). A motion for summary determination may 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 that 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 provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212.

Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“Inasmuch 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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1ST Dept 1992], quoting *Zuckerman*). In this case, as the issue is whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. Petitioner did not respond to the Division’s motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Std. Metals*, 99 AD2d 227 [1ST Dept 1984] *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Picard, Ramundo, and Bedard affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel, Inc. v Baiden* at 544; *Whelan v GTE Sylvania*).

C. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of determination (Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the timeliness of a taxpayer’s protest of a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order 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).

E. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be 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). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*).

F. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner’s last known address on September 30, 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 conform with the address listed on petitioner’s 2015 Resident

income tax return, filed with the Division on February 22, 2016, as well as the address listed on the petition, which satisfies the “last known address” requirement. It is thus concluded that the Division properly mailed the notice when it was delivered into the custody of the USPS on September 30, 2016. Since it was properly addressed with the requisite amount of postage affixed, 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. The Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference 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). In this case, however, there is no indication that a valid power of attorney was on file at the time the notice was issued, or at any time prior to October 21, 2016, the date the incomplete POA was first submitted to the Division. Accordingly, the statute of limitations for filing a timely protest commenced on September 30, 2016 and was not tolled.

H. The Division has established that notice of determination L-045494569 was properly mailed as addressed to petitioner at his last known address on September 30, 2016. Having established that the notice of determination was properly mailed to petitioner, it was incumbent upon petitioner to file either a request for conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioners did not file a request for conciliation conference with BCMS, but

rather opted to file a petition for a hearing before the Division of Tax Appeals in the first instance. However, the petition was not filed until March 30, 2017, a date that falls beyond 90 days after the date of issuance of the notice. Thus, insofar as the petition seeks a hearing on the merits of the notice, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The Division's motion is granted and the petition of Abdul A. Shamim is hereby dismissed.

DATED: Albany, New York
December 20, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE