

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARK LEINWOHL : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 828341
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2011 through August 31, 2015. :

Petitioner, Mark Leinwohl, 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, 2011 through August 31, 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel), brought a motion, dated April 18, 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 Christopher Whalen, CPA, did not respond to the Division of Taxation's motion by the due date of May 18, 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, James P. Connolly, 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 two 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 two notices of determination, both dated December 7, 2016, and bearing assessment identification numbers L-045805774 and L-045805775 (notices). The notices were addressed to petitioner at an address in North Brunswick, New Jersey.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. The request was faxed to BCMS on August 11, 2017.

3. On August 25, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order indicates that petitioner's protest of the notice was untimely and states, 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 December 7, 2016, but the request was not received until August 11, 2017, 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 August 29, 2017.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit, dated April 2, 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 December 7, 2016; (iii) an affidavit, dated April 6, 2018, of Fred Ramundo, a supervisor in the Division's mail room; (iv) copies of the notices, both dated December 7, 2016, with their associated mailing cover sheets; (v) a copy of petitioner's request for

conciliation conference, filed with BCMS on August 11, 2017; (vi) a copy of the conciliation order issued to petitioner on August 25, 2017 (CMS No. 276355); and (vii) a copy of petitioner's electronically filed IT-203 (Nonresident and Part-Year Resident Web-Filed Income Tax Return), for the period January 1, 2008 through December 31, 2008, filed on January 31, 2009, which lists the same address for petitioner as that listed on the notices, the request for conciliation conference and the petition. The 2008 tax return was the last return filed with the Division by petitioner before the notices were 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 generating statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs. She 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 on which they are to be mailed. Each page of the CMR lists an initial date that is approximately 10 days in advance of such 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 "12/7/16," i.e., the preprinted date on the notices. In addition, as described by Ms. Picard, all pages of the CMR are banded together when the documents are delivered into the 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," as set forth in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number for 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 133 pages and lists 1,458 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 133, which contains 6 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 December 7, 2016, to each page of the CMR, wrote and circled the number "1458" on page 133 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 133.

9. Page 5 of the CMR indicates that two notices of determination, bearing certified control numbers 7104 1002 9730 0063 7080 and 7104 1002 9730 0063 7097, and assessment ID numbers L-045805774 and L-045805775, respectively, were mailed to petitioner at the North Brunswick, New Jersey, address listed on the notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these same certified control numbers and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo describes the general operations and procedures followed in the Division's mail room. Mr. Ramundo has been a supervisor in the mail room

since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are delivered to the mail room and are placed in an “Outgoing Certified Mail” area. 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 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. Thereafter, a staff member 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 133 pages of the CMR attached to the Picard affidavit as Exhibit “A” contains a USPS postmark dated December 7, 2016. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s writing and circling “1458” on the last page of the CMR (page 133), and the employee’s initialing of that page indicate that all of the 1,458 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on December 7, 2016.

11. According to both the Picard and Ramundo affidavits, copies of the notices were mailed to petitioner on December 7, 2016, as claimed.

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 of the Tax Appeals Tribunal (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. 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.

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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Village 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. 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 v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Picard and Ramundo affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. 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 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).

F. 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 its mailing of the notice 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 it uses 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).

G. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on December 7, 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 sheets and CMR conforms with the address listed on petitioner's 2008 e-filed nonresident and part-year resident income tax return, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on December 7, 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]).

H. Petitioner's request for conciliation conference was filed on August 11, 2017. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was not timely filed (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [b]), and the same was properly dismissed by the August 25, 2017 conciliation order issued by BCMS. Petitioner has offered no claim or evidence to meet his burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notices expired.

I. The Division's motion for summary determination is hereby granted, the petition of Mark Leinwohl is denied, and the August 25, 2017 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
August 9, 2018

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE