

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LYNN TILTON	:	DETERMINATION
	:	DTA NO. 828369
	:	
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period March 1, 2016 through	:	
August 31, 2016.	:	

Petitioner, Lynn Tilton, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2016 through August 31, 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion on March 7, 2019, 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. Petitioner, appearing by Hodgson Russ, LLP (K. Craig Reilly, Esq., of counsel), filed her response to the Division of Taxation's motion on May 20, 2019, 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, Donna M. Gardiner, 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 determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion on March 7, 2019 for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of notices of determination, dated January 5, 2017, and bearing assessment identification numbers L-045919627 and L-045919628 (notices). The notices are addressed to petitioner, Lynn Tilton, at an address in Highland Beach, Florida.

2. On August 14, 2017, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

3. On September 1, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notices 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 January 5, 2017, but the request was not received until August 14, 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 September 18, 2017.

5. In support of the motion and to show proof of proper mailing of the notices, the Division provided, along with an affidavit of Anita K. Luckina, the following with its motion papers: (i) an affidavit, dated December 11, 2018, 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 January 5, 2017; (iii) an affidavit, dated December 14, 2018, of Fred

Ramundo, a supervisor in the Division's mail room; (iv) copies of the notices mailed to petitioner with the associated mailing cover sheets; (v) a copy of petitioner's request for conciliation conference, stamped as received by BCMS on August 14, 2017; (vi) a copy of the conciliation order issued by BCMS on September 1, 2017; and (vii) a copy of petitioner's 2015 New York State non-resident income tax return, form IT-203, dated October 15, 2016. The tax return dated October 15, 2016 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 February 2006 and Acting Director since May 2017, 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 "1/5/17." In addition, as described by Ms. Picard, generally 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," 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 29 pages and lists 312 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 29, which contains 4 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 January 5, 2017, to each page of the CMR, wrote the number "312" on page 29 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 29.

9. Page 26 of the CMR indicates that a notice with certified control number 7104 1002 9730 0069 3734 and reference number L-045919627 was mailed to petitioner at the Highland Beach, Florida, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted. Page 27 of the CMR indicates that a notice with certified control number 7104 1002 9730 0069 3741 and reference number L-045919628 was mailed to petitioner at the Highland Beach, Florida, address listed on the notice. The corresponding mailing cover sheet,

also attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes the 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 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 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 January 5, 2017. On page 29, corresponding to "Total Pieces and Amounts," is the preprinted number 312 and next to "Total Pieces Received At Post Office" is the handwritten entry "312." There is a set of initials or signature on page 29. According to the Picard and Ramundo affidavits, copies of the notices were mailed to petitioner on January 5, 2017 as claimed.

11. In petitioner's response in opposition to the Division's motion, petitioner provided, along with the affidavit of K. Craig Reilly, the following: (i) a copy of a Freedom of Information Law (FOIL) request made to the Division's Records Access Officer dated March 8, 2019; (ii) the Division's reply to the FOIL request dated April 22, 2019; (iii) pages from the USPS's Domestic Mail Manual from USPS.com; and (iv) an undated, USPS tracking sheet for certified control numbers 71041002973000693741 and 710410029973000693734. This tracking sheet simply states "Label Created, not yet in system." Petitioner did not submit any foundational affidavit or other evidence explaining the USPS printout.

12. Included with the Division's reply to the FOIL request was a portion of a CMR that reflected notices sent to petitioner on October 27, 2017. Although these notices are not in issue, petitioner submitted this portion of the CMR and the USPS tracking sheet that reflected the certified control numbers associated with these October 27, 2017 notices. The USPS tracking sheet that relates to the certified control numbers that correlate to the October 27, 2017 notices provides detailed information regarding the delivery history of the notices from the Division's delivery to the USPS in Albany, New York, up through the delivery of the notices to petitioner at her address. This information was submitted by petitioner to demonstrate that the USPS tracking sheet for the January 5, 2017 notices did not provide any information regarding delivery by the Division to the USPS. Petitioner argues that the tracking sheet would have reflected detailed delivery information, similar to the detailed information provided in the USPS tracking sheet for the October 27, 2017 notices, if, in fact, the notices were delivered by the Division to the USPS as claimed. Therefore, petitioner asserts that the Division failed to prove that it mailed the January 5, 2017 notices and, as such, summary determination must be denied.

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 and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b]).

Under our Rules of Practice and Procedure, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). Thus, a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence to eliminate any material questions of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted if there is any doubt as to the existence of a triable issue or where a material issue of fact is arguable (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). However, an opponent to a motion for summary judgment must produce evidence sufficient to require a trial of material questions of fact on which a claim is premised (*Whelan v GTE Sylvania*, 182 AD2d 446 [1992]). Mere conclusory allegations are insufficient to defeat a motion for summary judgment (*New York Natl. Bank v Harris*, 182 AD2d 680 [2d Dept 1992]).

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, with certain exceptions not relevant here (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice of determination 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]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003). A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the 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 taxpayer’s request for a conciliation conference is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the date and fact of mailing the subject statutory notices to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011).

D. The Division has offered proof sufficient to establish the mailing of the statutory notices on the same date that they were dated, i.e., January 5, 2017, to petitioner’s last known address. 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). Furthermore, the address listed on the mailing cover sheet for each

notice and on the CMR conforms with the address listed on petitioner's New York State income tax return for the year 2015 which satisfied the "last known address" requirement in Tax Law § 1138 (a) (1). The mailing of a notice of determination to an individual at the address given in the last New York personal income tax return filed by that individual at the time of such issuance generally fulfills this requirement (*see Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

E. Tax Law § 1147 (a) (1) provides that the proper mailing of a notice of determination "shall be presumptive evidence of the receipt of the same by the person to whom addressed." Receipt is thus "a part of the procedural equation [in sales tax cases] and by characterizing mailing as only 'presumptive evidence' establishes the taxpayer's right to rebut the presumption" (*Matter of Ruggerite v State Tax Commn.*, 64 NY2d 688, 690 [1984]). However, a successful rebuttal "must consist of more than a mere denial of receipt" (*Matter of T. J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]).

Petitioner has not produced evidence that establishes a material, arguable issue of fact regarding the Division's proper mailing of the notices. Here, there was no evidentiary foundation for the single-page printout submitted in support of petitioner's allegation that the Division failed to mail the notices to the correct address. Petitioner attempts to emphasize that a detailed USPS tracking sheet should be available for the certified control numbers used for the January 5, 2017 notices. Petitioner's argument is based on a USPS tracking sheet for two other certified control numbers associated with notices that were sent to her on October 27, 2017 that detailed the delivery from the possession of the Division to her ultimate receipt of them. However, there has been no foundation provided regarding the input of information that is set forth on the USPS

tracking sheet other than portions of a domestic mail manual obtained from the USPS web site. More importantly, the certified control numbers used are 20 digits in length and, as such, can easily be used more than once (*see Matter of Rywin, Inc.*, Tax Appeals Tribunal, April 24, 2008 [the Division reused the certified control number for petitioner's notice eight months later in a separate mailing]). As no additional information regarding the use of certified control numbers was provided or any additional information from the USPS that would explain the phrase "Label Created, not yet in system," such document does not raise a material question of fact regarding the Division's mailing of the statutory notices here at issue. In fact, this document merely indicates that no delivery information was available for those particular certified control numbers at the time of petitioner's search (*see Matter of Ahmed*, Tax Appeals Tribunal, June 29, 2017).

F. The notices in this case were properly mailed to petitioner at her last known address on January 5, 2017, 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]). Petitioner filed her request for conciliation conference on August 14, 2017, which date was in excess of 90 days and, as such, was properly dismissed by BCMS. Petitioner has offered no claim or 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 Division of Taxation's motion for summary determination is granted, the petition of Lynn Tilton is denied, and the conciliation order dismissing request, dated September 1, 2017, is sustained.

DATED: Albany, New York
August 15, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE