

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SHARON FORSTADT : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 828592
Uses Taxes under Articles 28 and 29 of the Tax Law for :
the period June 1, 2007 through May 31, 2008. :
:

Petitioner, Sharon Forstadt, 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, 2007 through May 31, 2008.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), brought a motion dated March 2, 2018 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 March 22, 2018, petitioner, appearing by Robert S. Lisch, E.A., submitted documents in opposition to summary determination and was granted an extension of time until July 2, 2018 to further respond to the motion. The 90-day period for issuance of this determination commenced on July 2, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings 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 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 determination (notices), dated February 17, 2009, and addressed to petitioner, Sharon Forstadt, at an address in Merrick, New York:

Notice #	Tax Period Ended	Notice Date
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. On December 1, 2016, petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices.

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 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 . . . 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 timely filed a petition with the Division of Tax Appeals in protest of the conciliation order dismissing request on March 10, 2017.¹

¹ Petitioner's initial petition, assigned Division of Tax Appeals case number 828124, was filed in protest of two notices of estimated determination and four notices of determination, including the four notices at issue here, notice numbers L-031572241, L-031572240, L-031572239, and L-031572238. On September 29, 2017, the Division filed a motion for summary determination for case number 828124. On January 18, 2018, Administrative Law Judge Russo issued a determination for the two notices of estimated determination and severed the four notices of determination for separate proceedings (*see Matter of Forstadt*, Division of Tax Appeals, January 18, 2018).

5. To show proof of proper mailing of the notices, the Division provided the following with its motion papers: (i) an affidavit, dated February 27, 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 February 17, 2009; (iii) an affidavit, dated February 28, 2018, of Fred Ramundo, a Stores and Mail Operations Supervisor in the Division's mail room; (iv) copies of the four February 17, 2009 notices of determination with the associated mailing cover sheets; (v) a copy of petitioner's request for conciliation conference, postmarked December 1, 2016; and (vi) a copy of 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 were issued.

6. The affidavit 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, 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

Those notices were assigned Division of Tax Appeals case number 828592, and are at issue herein.

page of the CMR, in the present case, to the actual mailing date of “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.

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 February 17, 2009 CMR consists of 2,012 pages and lists 22,121 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 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. 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,” and initialed or signed page 22,121.

9. Pages 1,242 and 1,243 of the 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 same certified control numbers 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 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 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 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. As noted, each of the 2,012 pages of the CMR attached to the Picard affidavit as Exhibit "A" contain a USPS postmark dated February 17, 2009. According to

Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials indicate that all of the 22,121 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on February 17, 2009.

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

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion for summary determination under section 3000.9 (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" and the moving party is entitled to a favorable determination as a matter of law (20 NYCRR 3000.9 [b] [1]).

B. 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 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, 382 [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 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. In this case, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on February 17, 2009. 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 conform with the address listed on petitioner's 2007 resident income tax return, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices of determination, numbers L-031572241, L-031572240, L-031572239 and L-031572238, on February 17, 2009, 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 with BCMS on December 1, 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 §§ 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 Division's motion for summary determination is hereby granted, the petition of Sharon Forstadt is denied, and the December 16, 2016 order dismissing petitioner's request is sustained.

DATED: Albany, New York
September 27, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE