

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ELITE FURNITURE WAREHOUSE CORP.	:	DETERMINATION
	:	DTA NO. 828838
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
for the period December 1, 2013 through August 31, 2016.	:	
	:	

Petitioner, Elite Furniture Warehouse Corp., 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, 2013 through August 31, 2016.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel), brought a motion dated March 27, 2019, seeking a 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, appeared by Reppert Kelly & Vytell, LLC (J. Vincent Reppert, Esq., of counsel). Upon extension, petitioner submitted a response to the motion, which was received by the Division of Tax Appeals on June 28, 2019. Based upon the extensions granted, the 90-day period for issuance of this determination commenced on June 28, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, 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 notice of determination number L-047489320.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of the notice of determination, dated November 28, 2017, and bearing assessment identification number L-047489320 (notice). The notice is addressed to petitioner, Elite Furniture Warehouse Corp. at 2211 Central Park Ave, Yonkers, New York, 10710-1424.

2. On August 3, 2018, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 303765, to petitioner, dismissing the request for a conciliation conference as not timely filed. The BCMS conciliation order indicated that petitioner's request for a BCMS conciliation conference was not received until June 22, 2018, a date that is more than 90 days after the notice issuance date of November 28, 2017.

3. Petitioner filed a petition that was received by the Division of Tax Appeals on August 13, 2018; accordingly, the petition was timely filed within 90 days of the BCMS conciliation order. In the petition, petitioner asserts that its request for a BCMS conciliation conference was prepared by its representative and filed on February 1, 2018. Petitioner asserts that since originally receiving the notice, it has been continuously working with the Division in an attempt to resolve the matter. Along with other documents, the petition includes: (i) a copy of a BCMS conciliation conference request for petitioner, signed by petitioner's representative and dated February 1, 2018; and (ii) a letter from petitioner's representative addressed to the Division,

dated July 31, 2018, asserting that the relevant BCMS conciliation conference request form was sent to the Division “on or about February 1, 2018.”

4. The Division filed an answer which was received by the Division of Tax Appeals on October 18, 2018. In its answer, the Division asserts that petitioner failed to timely protest the notice with BCMS or file a petition with the Division of Tax Appeals within 90 days of issuance of the notice.

5. The Division brought a motion which was received by the Division of Tax Appeals on April 1, 2019 (motion), seeking a summary determination with regard to the petition, asserting that petitioner failed to timely protest the notice with BCMS or file a petition with the Division of Tax Appeals within 90 days of issuance of the notice.¹

6. To show proof of proper mailing of the notice, the Division submitted with its motion, among other documents: (i) the affidavit, dated March 27, 2019, of Adam, L. Roberts, an attorney employed in the Office of Counsel of the Division; (ii) copies of the notice with the associated mailing cover sheets addressed to petitioner and petitioner’s representative; (iii) an affidavit, dated March 11, 2019, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS) of the Division; (iv) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked November 28, 2017; (v) an affidavit, dated March 13, 2019, of Fred Ramundo, a supervisor of the Division’s mail room; and (vi) a copy of a letter, dated June 21, 2018, from petitioner’s representative to the Division, wherein petitioner’s representative asserts that petitioner’s request for a BCMS conciliation conference was sent to a particular previous

¹ In no filing to date has either party claimed that petitioner filed a petition before issuance of the BCMS conciliation order. Accordingly, the fact that petitioner did not file a petition within 90 days of the issuance of the notice is not in dispute.

employee of the Division in February 2018; (vii) a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return (form ST-100) for the period of June 1, 2017 through August 31, 2017, which is the last return filed by petitioner prior to the issuance of the notice at issue; and (viii) a copy of petitioner's representative's power of attorney form, dated December 18, 2016 and filed with the petition.

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor 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 their mailing. 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 CMR in the present case to the actual mailing date of "11/28/17." 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 Division's return address on the front, and the 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 P.O. Address."

9. The November 28, 2017 CMR consists of 20 pages and lists 215 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 20, 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 United States Postal Service (USPS) representative affixed a postmark dated November 28, 2017 to each page of the CMR, wrote the number "215" next to the heading "Total Pieces Received at Post Office" on page 20, and initialed or signed each page of the CMR.

10. Page 8 of the CMR indicates that the notice with certified control number 7104 1002 9730 0193 0173 with reference number L-047489320, was mailed to petitioner at the Yonkers, New York, address listed on subject notice, and is the same address provided by petitioner in the petition, the petitioner's BCMS conciliation conference request form, petitioner's power of attorney form, and petitioner's New York State and local quarterly sales and use tax return (form ST-100) for the period of June 1, 2017 through August 31, 2017. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears the same certified control number and petitioner's name and address.

11. Page 3 of the CMR indicates that the notice with certified control number 7104 1002 9730 0192 9597 with reference number L-047489320, was mailed to petitioner's representative, J Vincent Reppert, at a Basking Ridge, New Jersey, address, and is the same, or substantially the same, address as provided for petitioner's representative on the petition, the petitioner's BCMS conciliation conference request form, and petitioner's power of attorney form dated December

18, 2016. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears the same certified control number and petitioner’s representative’s name and address.

12. The affidavit of Fred Ramundo, a supervisor in the Division’s mail room since December of 2013, and currently a stores and mail operations supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He attested that after a conciliation order is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. He also attested that the CMR was delivered to and accepted by the USPS on November 28, 2017 and a postal employee affixed a postmark to each page of the CMR and wrote “215” to indicate the total number of pieces of certified mail received by the USPS.

13. Mr. Ramundo stated that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail.

14. Based upon his review of the affidavit of Deena Picard, the exhibits attached thereto, the CMR, and his own personal knowledge of the procedures of the mail room, Mr. Ramundo avers that on November 28, 2017, an employee of the mail room delivered to a branch of the USPS in Albany, New York, in sealed postpaid windowed envelopes for delivery by certified mail, one item of certified mail addressed to petitioner at its Yonkers, New York, address, and one item of certified mail to petitioner’s representative at his Basking Ridge, New Jersey, address. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the mail room in the ordinary course of business when handling items to

be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail on November 28, 2017.

15. Petitioner filed a response in opposition to the Division's motion which included: (i) an affirmation of Mr. Reppert, dated June 26, 2019; (ii) an additional affirmation of Mr. Reppert, dated August 08, 2018; (iii) an affidavit of Gayle Diamond, dated June 26, 2019; and (iv) a retailer agreement contract, dated August 26, 2015, between petitioner and a third party.

16. In the affirmation dated June 26, 2019, Mr. Reppert asserts, in part: (i) that since issuance of the notice, petitioner has fully cooperated with the Division and provided all documents in its possession and continued to discuss a resolution regarding the matter with the Division; (ii) on or about February 1, 2018 petitioner's counsel filed a request for a BCMS conciliation conference by regular mail; (iii) after making the request for a BCMS conciliation conference, he made numerous attempts to follow up with the Division to schedule a conference and was consistently told that a conference would be scheduled shortly; (iv) after numerous calls to the Division, his assistant, Gayle Diamond, faxed a copy of petitioner's February 1, 2018 BCMS conciliation conference request to the Division on or about June of 2018; (v) on or about August 3, 2018, BCMS advised him that petitioner's request for a BCMS conciliation conference was received on June 22, 2018 and was denied as being untimely; (vi) he had a discussion of the merits of the underlying additional tax asserted by the notice; and (vii) that the relief sought by the Division in the motion should be denied, or at a minimum, deferred, until a BCMS conciliation conference is held.

17. In the affirmation dated August 8, 2018, Mr. Reppert asserts much of the same information as claimed in the affirmation dated June 26, 2019.

18. The affidavit of Gayle Diamond, dated June 26, 2019, asserts that: (i) she prepared and mailed the BCMS conciliation conference request on February 1, 2018; (ii) she contacted the Division on multiple occasions regarding scheduling a BCMS conciliation conference; and (iii) on or about June 21, 2018, she faxed the BCMS conciliation conference request to the Division.

19. Other than the representations made in petitioner's representative's affirmations and affidavit, there is no USPS postmarked envelope, or other documentation, in the record supporting the claim that petitioner's BCMS conciliation conference request was filed on February 1, 2018.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion for summary determination under section 3000.9 (b) of the Tax Appeals Tribunal's Rules of Practice and Procedures (Rules). As the petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 3), the Division of Tax Appeals has jurisdiction over the petition and, 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 a conciliation conference.

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]). “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*). Conclusory statements alone are insufficient to defeat a motion for summary judgement (*see New York Nat. Bank v Harris*, 182 AD2d 680 [2d Dept 1992], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

D. A taxpayer may contest a statutory 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]). 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]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a BCMS 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). If petitioner filed its request for a BCMS conciliation conference on February 1, 2018 its protest would be timely; however, if petitioner can not establish this fact, its June 22, 2018 filing is too late.

E. Where, as here, the timeliness of a request for conciliation conference 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).

F. In this case, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known addresses on November 28, 2017 (*see* finding of fact 10). 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, petitioner's address on the mailing cover sheet and CMR conforms with the address listed on petitioner's New York State and local quarterly sales and use tax return (form ST-100) for the period of June 1, 2017 through August 31, 2017, which appears to be the last return filed by petitioner before the notice was mailed, and thus satisfies the "last known address" requirement for the November 28, 2017 notice mailing.

G. While the Tax Law does not specifically provide for service of the statutory notice on a taxpayer's representative, the Tax Appeals Tribunal's prior decisions have 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 Uddin*, Tax Appeals Tribunal, January 18, 2018, citing *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, the Division has offered proof sufficient to establish the mailing of the notice to the petitioner's representative's address on November 28, 2017 (*see* findings of fact 11 and 12). The representative's address on the mailing cover sheet and CMR conforms with the address provided on the December 18, 2016 power of attorney form.

H. It is thus concluded that the Division properly mailed the notice on November 28, 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]).

I. Petitioner contends that it mailed its BCMS conciliation conference request on February 1, 2018, which, if properly established, would make petitioner's protest timely. The relevant BCMS order indicates that petitioner's BCMS conciliation conference request was not received by BCMS until June 22, 2018 which would be beyond the 90 day period in which a protest must be filed in order to be timely (*see* finding of fact 2). Petitioner's representative asserts that the June 22, 2018 conciliation conference request received by BCMS was the second time it sent the relevant request and the original request was mailed on February 1, 2018.

J. When a notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and taxpayer's representative, if any) at its last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Khayer Kayumi*, Tax Appeals Tribunal, June 27, 2019; citing *Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

K. The filing of a conciliation conference request with BCMS can be made either by delivery in person or by mail (20 NYCRR 4000.7 [a] [1] [i]). If the request is made by mail, the date of the United States postmark stamped on the envelope in which the request is contained, will be deemed the “date of service or filing” (20 NYCRR 4000.7 [a] [1] [ii]). In this case petitioner alleges that it filed a BCMS conciliation request by regular mail on February 1, 2018; however, there is no postmarked envelope in the record establishing the date of the mailing (*see* finding of fact 19). In cases such as this, where petitioner uses regular mail, the sender assumes the risk that they cannot produce an envelope that will bear a postmark date that is within the prescribed date for filing unless they use USPS registered or certified mail (*see* 20 NYCRR 4000.7 [a] [2] [iii]; *see also Matter of Accidental Husband Intermediary, Inc.*, Tax Appeals Tribunal, April 11, 2019).

L. As noted, the BCMS order indicates that petitioner’s request for a conciliation conference was not received until June 22, 2018. Since this date falls after the 90-day period of limitations for the filing of such a request the request was untimely (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [b]) and the same was properly dismissed by the August 3, 2018 order issued by BCMS. Petitioner has offered insufficient evidence to meet its burden to prove that a timely protest was filed before the 90-day period of limitations for challenging the notice expired (*see Matter of Accidental Husband Intermediary, Inc.*).

M. The Division's motion for summary determination is hereby granted, the petition is denied, and the August 3, 2018 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
September 19, 2019

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE