

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANCIS WEBSTER III : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 828869
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Periods Ending May 31, 2016, :
August 31, 2016, and November 30, 2016.

Petitioner, Francis Webster III, 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 periods ending May 31, 2016, August 31, 2016, and November 30, 2016.

On November 30, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the basis that the petition did not appear to have been filed in a timely manner. The parties were given until February 14, 2019 to respond to said notice. On December 12, 2018, petitioner submitted a letter opposing the dismissal. On February 13, 2019, the Division of Taxation, appearing by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel), submitted an affidavit and documentation in support of the dismissal. The 90-day period for issuance of this determination commenced on February 14, 2019. Based upon the affidavits and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the

issuance of three notices of estimated determination.

FINDINGS OF FACT

1. Petitioner, Francis Webster III, filed a petition that was received by the Division of Tax Appeals on August 29, 2018. The envelope containing the petition bears a United States Postal Service (USPS) label, indicating the petition was mailed on August 25, 2018.

2. The petition protested three notices of estimated determination bearing assessment numbers L-047603532, L-047603533, and L-047603534, all dated January 18, 2018 (notices).

3. A warrant bearing identification number E-807814531-W001-8, was docketed in the Albany County Clerk's Office with respect to the notices on July 25, 2018. The warrant lists petitioner as the individual judgment debtor and responsible person of Click Security, Inc.

4. On November 30, 2018, Herbert M. Friedman, Jr., Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notices, the petition was not timely filed.

5. In response to the issuance of the notice of intent and to prove mailing of the notices issued on January 18, 2018, the Division of Taxation (Division) provided the following: (i) an affidavit, dated February 11, 2019, of Stephanie M. Scalzo, an attorney employed by the Office of Counsel of the Division; (ii) copies of the notices with the associated mailing cover sheets addressed to petitioner; (iii) an affidavit, dated December 13, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked January 18, 2018; (v) an affidavit, dated December 14, 2018, of

Fred Ramundo, a supervisor of the Division's mail room; (vi) an affidavit, dated January 25, 2019, of Heidi Corina, Legal Assistant 2 in the Division's Office of Counsel involved in making requests to the USPS for delivery information; (vii) three postal service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) pertaining to petitioner and the USPS response to such requests dated January 17, 2019; and (viii) a copy of petitioner's address summary from the Division's e-MPIRE database showing petitioner's address as updated via the USPS National Change of Address (NCOA) database, effective June 24, 2017, which is the same address as that listed on the subject notices and on the petition. This was petitioner's last known address prior to the issuance of the notices.

6. 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 "1/18." 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 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 PO Address."

8. The January 18, 2018 CMR consists of 21 pages and lists 227 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 21, which contains 7 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 18, 2018 to each page of the CMR, wrote the number "227" next to the heading "Total Pieces Received at Post Office" on page 21, and initialed or signed each page of the CMR.

9. Page 21 of the CMR indicates that the notices with certified control numbers 7104 1002 9730 0200 5641, 7104 1002 9730 0200 5658, and 7104 1002 9730 0200 5665 with reference numbers L-047603532, L-047603533, and L-047603534, respectively, were mailed to petitioner at the Austin, Texas, address listed on the subject notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo describes the general operations and procedures within the Division's mail room. 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 notices are received in the mail room and placed in the “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, so that the address and certified number from the mailing cover sheet shows through the window. 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee 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, the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark dated January 18, 2018. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicates that all 227 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on January 18, 2018.

11. According to the Picard and Ramundo affidavits, the notices were mailed to petitioner on January 18, 2018, as claimed.

12. The affidavit of Heidi Corina describes the Division’s requests to the USPS for delivery information. Specifically, using three separate PS forms 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104

1002 9730 0200 5641, 7104 1002 9730 0200 5658, and 7104 1002 9730 0200 5665. The USPS responses to the requests indicate that the articles bearing the aforementioned certified control numbers that were addressed to petitioner were delivered on January 22, 2018, in Austin, Texas. Attached to the Corina affidavit as exhibit “A” are the Division’s “Requests for Delivery Information” for article numbers 7104 1002 9730 0200 5641, 7104 1002 9730 0200 5658, and 7104 1002 9730 0200 5665. Exhibit “B” to the Corina affidavit are the USPS responses to each of the Division’s requests indicating delivery of the same articles on January 22, 2018, to “Austin, TX 10018.”

13. In response to the notice of intent, petitioner submitted a letter dated December 12, 2018, claiming, in pertinent part, that he is not responsible for the tax liability. Petitioner acknowledges that the petition was not timely filed, but requests that the appeal be considered.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

B. 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]).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law §§ 1138 [a]; 2006 [4]). 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). 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 taxpayer's protest of a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). 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.*).

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*, Tax Appeals Tribunal, August 12, 1993).

F. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on January 18, 2018. 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 the USPS NCOA database, which satisfies the "last known address" requirement (*see* Tax Law § 1138 [a] [1]). The Corina affidavit and the accompanying USPS delivery information also show that copies of the subject notices, addressed to petitioner at his last known address, were delivered to petitioner at his Austin, Texas, address on January 22, 2018. It is thus concluded that the Division properly mailed the notices on January 18, 2018, 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 (*see* Tax Law § 1138 [a] [1]).

G. In sum, the Division has established that the notices of estimated determination bearing assessment numbers L-047603532, L-047603533, and L-047603534 were properly mailed as addressed to petitioner at his last known address on January 18, 2018. Having established that the notices of estimated determination were properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until August 24, 2018, and received on August 29, 2019, dates that fall beyond 90 days after the date of issuance of the notices of estimated determination. Thus, insofar as the petitioner seeks a hearing on the merits of the notices, 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).

H. The petition of Frances Webster III is dismissed.

DATED: Albany, New York
May 2, 2019

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE