

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
THEODORE NUGENT : DETERMINATION
for Revision of Determinations or for Refund of Sales and : DTA NO. 829037
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods June 1, 2016 through February 28, 2017 and June :
1, 2017 through November 30, 2017. :
:

Petitioner, Theodore F. Nugent, 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 June 1, 2016 through February 28, 2017 and June 1, 2017 through November 30, 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion dated May 1, 2019, seeking an order dismissing the petition, or in the alternative, granting summary determination in the above-captioned matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Christopher R. Smith, CPA, and Karen E. Smith, CPA, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this determination commenced on May 31, 2019. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, 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 five notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued the following five notices of determination, each dated June 5, 2018 (notices), to petitioner, Theodore Nugent:

Assessment ID Number	Tax Period Ended	Tax	Interest	Penalty	Payments / Credits	Balance Due
L-048248902	11/30/17	\$14,788.77	\$1,014.19	\$2,218.27	-	\$18,021.23
L-048248903	8/31/17	\$15,493.66	\$1,255.08	\$2,453.80	\$4,500.00	\$14,702.54
L-048248904	2/28/17	\$7,993.62	\$1,335.37	\$1,764.38	\$1,100.00	\$9,993.37
L-048248905	11/30/16	\$17,934.97	\$4,107.05	\$4,757.27	\$500.00	\$26,299.29
L-048248906	8/31/16	\$17,661.71	\$4,014.80	\$4,618.37	\$3,500.00	\$22,794.88

All of the notices were addressed to petitioner at a Staten Island, New York, address, and were issued to him upon the Division's assertion that he was an officer or responsible person of Park Luncheonette, Inc., for the periods specified in the notices. Copies of the notices were mailed on June 5, 2018 to Karen E. Smith, CPA, petitioner's representative, at 482 Manor Road, Staten Island, New York.

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 filed with BCMS on September 26, 2018.

3. On December 14, 2018, 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 June 5, 2018, but the request was not received until September 28, 2018, 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 December 19, 2018. In an attachment to the petition, petitioner specifically identified the notices and set forth the substantive argument that he was not a person responsible or required to collect and remit sales tax on behalf of Park Luncheonette, Inc. Thereafter, in a letter dated December 27, 2018 that was faxed to the Division of Tax Appeals on the same day, petitioner explained why his request for a hearing with BCMS was denied. Petitioner asserted that the notices dated June 5, 2018 were mailed to him via certified mail, but because he had moved, he did not receive the notices until after the 90-day time period within which to appeal such notices had expired. Petitioner requested that this statement be added to his petition.¹

5. In support of the motion and to show proof of proper mailing of the notices to petitioner and his representative, the Division provided the following documents: (i) an affidavit, dated April 30, 2019, of Melanie Spaulding, Esq.; (ii) an affidavit, dated April 3, 2019, 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); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked June 5, 2018; (iv) copies of the notices

¹To the extent petitioner intended to amend his petition with the letter, it was filed with the Division of Tax Appeals before the period for responding to the petition had expired and was accepted as an amendment to the petition (*see* 20 NYCRR 3000.4 [d] [1]).

mailed to petitioner and his representative with the associated mailing cover sheets; (v) an affidavit, dated March 4, 2019, of Fred Ramundo, a supervisor in the Division's mail room; (vi) a copy of petitioner's request for conciliation conference that was stamped as received by BCMS on September 28, 2018, which lists the same address for petitioner as that listed on the notices; (vii) a copy of the conciliation order issued by BCMS on December 14, 2018; and (viii) a copy of petitioner's electronically filed 2016 New York resident income tax return, filed on April 17, 2017, which lists the same address for petitioner as that listed on the notices. The 2016 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 the Acting Director of MAPS since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with the Division's past and present procedures as they relate to statutory notices. Statutory notices that are generated from CARTS 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 page of the CMR in the present case to the actual mailing date of "6/5." 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. 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 13 pages and lists 133 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 13, which contains one entry. 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 June 5, 2018, to each page of the CMR, wrote the number “133” on page 13 next to the heading “Total Pieces Received at Post Office,” and initialed page 13.

9. Page two of the CMR indicates that five notices with certified control numbers 7104 1002 9730 0255 1636, 7104 1002 9730 0255 1643, 7104 1002 9730 0255 1650, 7104 1002 9730 0255 1667, and 7104 1002 9730 0255 1674, and assessment ID numbers L-048248902, L-048248903, L-048248904, L-048248905, and L-048248906, respectively, were mailed to petitioner at the Staten Island, New York, address listed on the 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. Page three of the CMR indicates that five notices with certified control numbers 7104 1002 9730 0255 1711, 7104 1002 9730 0255 1728, 7104 1002 9730 0255 1735, 7104 1002 9730 0255 1742, and 7104 1002 9730 0255 1759, and assessment ID numbers L-048248902, L-048248903, L-048248904, L-048248905, and L-048248906, respectively, were mailed to petitioner's representative, Karen E. Smith, CPA, at 482 Manor Road, Staten Island, New York. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and the representative'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 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. Each page of the CMR in exhibit "A" of the Picard

affidavit contains a postmark of June 5, 2018. On page 13, corresponding to “Total Pieces and Amounts,” is the preprinted number 133 and next to “Total Pieces Received At Post Office” is the handwritten entry “133.” There is also a set of initials on page 13. While Mr. Ramundo avers that the total number of pieces of certified mail received is also circled, a review of the CMR shows that it is not.

11. Based on his review of the affidavit of Ms. Picard and the exhibits attached thereto, including the CMR, and his personal knowledge of the procedures of the mail room, Mr. Ramundo stated that on June 5, 2018, an employee of the mail room delivered five pieces of certified mail addressed to petitioner, Theodore Nugent, at the Staten Island, New York, address listed on the notice and petitioner’s representative, Karen E. Smith, CPA, at 482 Manor Road, Staten Island, New York 10314, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Ramundo attested that the procedures described in his affidavit were the regular procedures followed by the mail room staff 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 to petitioner and his representative on June 5, 2018.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9 (a) of the Tax Appeals Tribunal’s Rules of Practice and Procedure (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 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

conciliation conference (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013). 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]). 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]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad*, 64 NY2d at 853). Summary judgment is a drastic remedy and should not be granted where there is any uncertainty as to the existence of a triable issue (*see Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

Once a proponent of summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the party opposing the motion must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial on the merits (*see CPLR 3212 [b]*; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986] citing *Zuckerman*, 49 NY2d at 562). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562).

C. Petitioner did not respond to the Division's motion. Petitioner has thus presented no evidence to contest the facts alleged in the Picard and Ramundo affidavits; consequently, those facts are deemed admitted (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]).

D. 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 (*see* 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).

E. 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 (*see* Tax Law § 1147 [a] [1]; *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. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner and to his representative on June 5, 2018.² Specifically, the CMR lists certified control numbers with corresponding names and addresses and bears USPS postmarks on each page, dated June 5, 2019. Additionally, the postal employee wrote “133” on the last page of the CMR next to his or her initials to indicate receipt by the post office of all pieces of mail listed thereon. Thus, the CMR has been properly completed and 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 described the Division’s general mailing procedure and the CMR established 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 on the CMR conformed with the address listed on petitioner’s 2016 e-filed resident income tax return, which satisfied the “last known address” requirement of Tax Law § 1138 (a) (1) (*see* finding of fact 5).

G. It is concluded that the Division properly mailed the notices on June 5, 2018 to both petitioner and his representative, 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 §§ 170 [3-a] [a]; 1138 [a] [1]). The Division’s proper issuance of the notices gives rise to a rebuttable presumption that the notices were received by the taxpayer in

² While the Tax Law does not specifically provide for service of the notice on a taxpayer’s representative, the Tax Appeals Tribunal has 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 Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996).

due course (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011). Petitioner asserted in an addendum to his petition that he did not receive the notices within the 90-day period within which he could appeal because he moved. However, petitioner has offered no evidence in support of his claim, including any proof that he provided the Division with a change of address. Accordingly, petitioner's denial of timely receipt is not supported by any evidence and does not sufficiently rebut the presumption of receipt (*see Matter of T. J. Gulf v State Tax Commn.*, 124 AD2d 324 [3d Dept 1986]). Petitioner's request for conciliation conference was filed on September 26, 2018. 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 §§ 1138 [a] [1]; 170 [3-a] [b]) and the same was properly dismissed by the December 14, 2018 order issued by BCMS.

H. The Division's motion for summary determination is hereby granted, the petition is denied, and the December 14, 2018 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
August 29, 2019

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE