

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
IOANNIS GEORGIADES : DETERMINATION
for Revision of Determinations or for Refund of New York : DTA NO. 829291
State Sales and Use Taxes Under Articles 28 and 29 of the :
Tax Law for the period September 1, 2014 through :
August 31, 2018. :
_____ :

Petitioner, Ioannis Georgiades, 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 September 1, 2014 through August 31, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel), brought a motion dated July 8, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., and Christopher L. Doyle, Esq., of counsel), filed a response to the motion on August 4, 2020. The 90-day period for issuance of this determination commenced on August 7, 2020. 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 timely filed a petition with the Division of Tax Appeals following the

issuance of a notices of determination numbers L-049268830 and L-049269034.

FINDINGS OF FACT

1. On April 5, 2019, petitioner, Ioannis Georgiades, filed a petition with the Division of Tax Appeals challenging notices of determination numbers L-049268830 and L-049269034, issued by the Division of Taxation (Division) for the period September 1, 2014 through August 31, 2018 (notices).

2. The Division filed an answer on June 12, 2019.

3. The Division filed a motion on July 8, 2020 seeking dismissal of the petition, or in the alternative, summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of the notices. The notices are addressed to petitioner, Ioannis Georgiades, at an address in Glen Head, New York. The notices state that the Division's records indicate that petitioner is/was an officer/responsible person of J. Mendel Inc.

4. In support of its motion and to show proof of proper mailing of the notices, the Division provided the following with its motion papers, among other documents, (i) an affidavit of Adam L. Roberts, a senior attorney employed in the Office of Counsel of the Division, dated July 8, 2020; (ii) an affidavit, dated July 1, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 13, 2018; (iv) an affidavit, dated July 2, 2020, of Susan Saccocio, the manager of the Division's mail room; (v) copies of the notices, dated December 13, 2018, with associated mailing cover sheets; and (vi) a copy of petitioner's e-filed resident income tax return for the year 2017, dated October 15, 2018, which was the last return or application filed with the Division by petitioner before the notices were issued. Petitioner's 2017 return lists the

same Glen Head, New York, address for petitioner as that listed on the subject notices.

5. The affidavit of Deena Picard, who has been in her current position 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 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 is manually changed on the first and last page of the CMR to the actual date of mailing of "12/13/18." 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.

6. 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 P.O. ADDRESS.” Ms. Picard further states that “[t]he remaining headings list appropriate postage and fees.” An examination of the CMR shows that the headings for postage and fees appear on the last page of the CMR.

7. The December 13, 2018 CMR consists of 30 pages and lists 322 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR 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 December 13, 2018 to each page of the CMR, initialed and wrote and circled the number “322” on the last page next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.”

8. Page 18 of the CMR indicates that two notices of determination with certified control numbers 7104 1002 9730 0318 1634 and 7104 1002 9730 0318 1641 and assessment ID numbers L-049268830 and L-049269034, respectively, were mailed to petitioner at the Glen Head, 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.

9. The affidavit of Susan Saccocio describes the general operations and procedures of the Division’s mail room. Ms. Saccocio has been a manager in the mail room since 2017 and has been employed there since 2012, 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. Ms. Saccocio 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 of mail are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained 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 USPS employee initialed the last page of the CMR and affixed a postmark to each page of the CMR. 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. A review of the December 13, 2018 CMR indicates that the USPS employee complied with this request by writing and circling the number of pieces received on the CMR.

10. According to the affidavits submitted, copies of the notices were properly mailed to petitioner at his Glen Head, New York, address on the date indicated as claimed.

SUMMARY OF PETITIONER'S POSITION

11. Petitioner argues that the Division failed to properly mail the notices to his last known address, that the presumption of receipt of the notices has been rebutted, that the Division did not establish whether it properly issued copies of the notices to petitioner's alleged representative, and that the CMR is defective. To support his argument, petitioner submitted, among other items, a consent to extension of time (consent) for the responsible person of J. Mendel Inc., signed by petitioner, as president, and dated July 26, 2018. At the top of the consent, under petitioner's name, a preprinted address of 463 7th Ave, Fl 9, New York, NY 10018 is crossed out and an address of 36-20 34th Street, Long Island City, NY 11106 is

handwritten. The consent is stamped received by the Division on July 31, 2018. Petitioner argues that the notices should have been mailed to the handwritten address appearing on the consent.

In support of petitioner's argument that the presumption of receipt was rebutted, petitioner attached copies of two envelopes postmarked December 13, 2018, marked "unclaimed" by USPS with a return to sender label affixed over the mailing address. Petitioner also attached a printout purporting to show USPS tracking information for tracking numbers 71041002973003181634 and 71041002973003181641. The printout indicates, in part, that the items arrived at a USPS facility in Albany, New York, on December 13, 2018; the items were out for delivery in Glen Head, New York, on December 15, 2018 and "Notice Left (No Authorized Recipient Available)" at an address in Glen Head, New York, 11545; on December 24, 2018 and January 18, 2019, respectively, the items were available for pickup at an address in Glen Head, New York, 11545; and that on January 9, 2019 and January 29, 2019, respectively, the items were unclaimed and being returned to sender.

Petitioner further argues that the Division failed to properly issue the notices to petitioner's "apparent" representative, contending that the Division should have sent a copy of the notices to Steward Benjamin, CPA, the representative who appeared in the audit for the underlying business, J. Mendel Inc., on the grounds that consents to extend the statute of limitations were faxed to Mr. Benjamin during the audit of the business. Petitioner did not submit a power of attorney indicating that Mr. Benjamin was authorized to represent him individually at any time.

Finally, petitioner contends that the CMR is defective, alleging that the headings for "postage and fees" do not appear on it.

12. Petitioner's representative's affirmation affirms that petitioner has never filed a sales

tax return.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (*see* 20 NYCRR 3000.9 [a] [1] [ii]). 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]).

Section 3000.9 (c) of the Tax Appeals Tribunal’s Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211 and a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York*:

“Inasmuch 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 v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a

motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman*). In this case, as the issue is whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition, a motion to dismiss is the proper procedural vehicle (*see Matter of Urrego*, Tax Appeals Tribunal, July 12, 2018).

B. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a statutory notice, including the notice at issue here (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]; 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; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer’s protest is in question, the initial inquiry is on the mailing of the statutory notice because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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 (*id.*). The Division may meet

this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. 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).

E. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioner's last known address on December 13, 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 petitioner's 2017 resident income tax return, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notices on December 13, 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 (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

Petitioner did not request a conciliation conference. Instead, petitioner filed a petition with Division of Tax Appeals protesting the notices on April 5, 2019. This date falls after the 90-day period

of limitations for the filing a petition. As such, the Division of Tax Appeals lacks jurisdiction over the petition.

F. Petitioner's argument that the notices should have been mailed to the address listed on the consent is without merit. The consent was signed by petitioner July 26, 2018 and received by the Division on July 31, 2018. Subsequent to the date of the consent, but prior to the issuance of the notices, petitioner filed his 2017 personal income tax return, on October 15, 2018. This was the last return filed by petitioner before the notices were issued.

Tax Law § 1138 (a) (1) requires that a notice of determination "shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state." On the same point, Tax Law § 1147 (a) (1) provides that a notice of determination shall be mailed to the person for whom it is intended "at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." 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 mailing generally fulfills this requirement (*see Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *see also Matter of Chung*, Tax Appeals Tribunal, September 22, 2011).

The Division properly addressed the notice to petitioner's address as listed on his 2017 return, which was the last return or application made by him prior to the date the notices were issued. Petitioner's argument that the address on the earlier dated consents should have been used is rejected, as those consents were not the last return filed or application made prior to the issuance of the notices. Moreover, petitioner concedes that he did not file sales tax returns. As

such, there was no return filed pursuant to article 28 and the Division properly used the address given in the last New York personal income tax return filed by petitioner (*see id.*). Petitioner has presented no evidence that he notified the Division of a different address than that reported in his 2017 return after the filing of that return and prior to the date the notices were issued.

G. Petitioner's argument that the Division's motion should be denied on the basis that he has rebutted the presumption of receipt of the notices is rejected. In support of petitioner's argument that he did not receive the notices, he attached copies of two envelopes postmarked December 13, 2018, marked "unclaimed" by USPS with a return to sender label affixed over the mailing address. Petitioner also attached a printout purporting to show USPS tracking information for tracking numbers 71041002973003181634 and 71041002973003181641. The printout indicates, in part, that the items arrived at a USPS facility in Albany, New York, on December 13, 2018; the items were out for delivery in Glen Head, New York, on December 15, 2018 and "Notice Left (No Authorized Recipient Available)" at an address in Glen Head, New York, 11545; on December 24, 2018 and January 18, 2019, respectively, the items were available for pickup at an address in Glen Head, New York, 11545; and that on January 9, 2019 and January 29, 2019, respectively, the items were unclaimed and being returned to sender.

It is first noted that the USPS printout relied upon by petitioner does not establish a material, arguable issue of fact regarding the Division's proper mailing of the notice (*see Matter of Ahmed*, Tax Appeals Tribunal, June 29, 2017). There was no evidentiary foundation by one with firsthand knowledge for the USPS printout submitted in support of petitioner's arguments. Petitioner did not submit an affidavit from one with knowledge of USPS procedures to explain how the entries in the printout were compiled or what they mean. Petitioner's unsubstantiated allegations and assertions regarding the printout without the proper foundation and

authentication does not raise a material question of fact regarding the Division's mailing of the statutory notices (*see Matter of Ahmed; Whelan v GTE Sylvania*).

Moreover, even viewing the evidence in a light most favorable to petitioner, the USPS tracking information is insufficient as a matter of law to rebut the presumption of receipt.

Specifically addressing such tracking information, the Tribunal has stated:

“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 Comm., Dept. of Taxation & Fin. of State of N.Y.*, 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 [3rd Dept 1986]).

Here, petitioner asserts that the USPS tracking information shows that neither he nor his representative received the subject notice from the USPS. Even construing this evidence in a light most favorable to petitioner, as we must (*see Matter of Guffin*), we find that the tracking information is insufficient as a matter of law to rebut the presumption of receipt.

Under certain circumstances, a properly mailed notice of determination may be deemed constructively received and thus evidence of actual non-receipt may be insufficient to rebut the presumption. One such circumstance occurs when a taxpayer refuses to accept delivery of a notice (*Cars ‘R’ Us v Chu*, 147 AD2d 797 [3rd Dept 1989]). Here, the USPS tracking information indicates that the notice of determination addressed to petitioner was offered for delivery and refused (*see* finding of fact 18). Another such circumstance occurs when a notice is offered for delivery, but it is subsequently returned to the Division as unclaimed (*Matter of New York City Billionaires Constr. Corp.*). The tracking information pertaining to the notice mailed to petitioner’s representative indicates that this notice was offered for delivery, but was unclaimed” (*Matter of Ahmed*, April 10, 2018).

Here, the tracking information presented by petitioner shows that the notices were offered for delivery and available for pickup, but were unclaimed and returned to sender. Under such

circumstances, the notices are deemed constructively received and petitioner has failed to rebut the presumption of receipt (*see id.*).

H. Petitioner's argument that the Division failed to mail the notices to his "apparent" then-representative is also rejected. Petitioner has not presented a power of attorney form or other evidence in admissible form to show that he had an authorized representative at the time the notices were issued. Petitioner contends that the Division should have sent a copy of petitioner's notices to Mr. Benjamin, the representative for J. Mendel Inc., on the grounds that he appeared to be petitioner's representative because consents to extend the statute of limitations were allegedly faxed to him during the audit of the business. Petitioner's argument that the Division must have believed Mr. Benjamin was his then-representative is mere speculation insufficient to defeat the Division's motion (*see Whelan v GTE Sylvania*). Petitioner has failed to present evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim that the Division should have mailed a copy of the notice to his alleged representative.

I. Lastly, petitioner's argument that that the CMR is defective is entirely lacking in merit. Petitioner contends that the Division did not follow its established procedures for mailing statutory notices and/or that the CMR is defective, alleging that the headings for "postage and fees" do not appear on the CMR as attested to in the Picard affidavit. However, contrary to petitioner's argument, a simple review of the CMR clearly shows that such headings appear on the last page of the CMR. As such, petitioner's argument is rejected.

J. As noted above, the Division brought the present matter as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). The standard of review for both such motions is the same

(*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016). As discussed above, the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition and the Rules of Practice and Procedure provide for the dismissal of such a petition pursuant to a motion to dismiss (20 NYCRR 3000.9 [a] [ii]). Accordingly, the Division's motion to dismiss is granted, and the motion for summary determination is thereby rendered moot (*Matter of Urrego; Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015).

K. The Division's motion to dismiss is hereby granted, the notices dated December 13, 2018 are sustained, and the petition is denied.

DATED: Albany, New York
November 5, 2020

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE