

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JASON J. DENTON : DETERMINATION
 : DTA NO. 829616
for Revision of a Determination or for Refund of New :
York of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Tax Period December 1, 2012 :
through February 28, 2013. :
:

Petitioner, Jason J. Denton, 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, 2012 through February 28, 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion, dated February 21, 2020, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) (i) and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Isaac Sternheim & Co. (Isaac Sternheim, CPA), did not respond to the motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, 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 a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a petition filed by petitioner, Jason J. Denton, protesting a notice of determination, dated September 4, 2013, and bearing assessment identification number L-040034320 (notice). The notice is addressed to petitioner at an address in New York, 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 notice. The request was mailed by petitioner to BCMS in an envelope bearing a United States Postal Service postmark of September 10, 2019, and was received by BCMS on September 13, 2019. The request denied receipt of the notice.

3. On September 27, 2019, BCMS issued a conciliation order dismissing request (CMS 000314446) (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice 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 September 4, 2013, but the request was not received until September 10, 2019, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on October 7, 2019. In his petition, petitioner denies receipt of the notice.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affirmation of Melanie Spaulding, Esq., dated February 21, 2020; (ii) an affidavit, dated January 27, 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 document entitled, in part, “Certified Record for Presort Mail –

Assessments Receivable” (CMR) postmarked September 4, 2013; (iv) an affidavit, dated February 4, 2020, of Fred Ramundo, a supervisor in the Division’s mail room; (v) a copy of the September 4, 2013 notice with the associated mailing cover sheet; (vi) a copy of petitioner’s request for conciliation conference, mailed to BCMS by certified mail in an envelope postmarked September 10, 2019; and (vii) a copy of petitioner’s undated 2011 form IT-201, New York State resident income tax return, which lists the same address for petitioner as that listed on the notice.

6. Ms. Spaulding’s affirmation asserts that petitioner’s 2011 form IT-201 was filed on October 15, 2012, and is the last return filed by petitioner before the notice was issued.

7. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. CARTS generates the CMR. Each page of the CMR lists an initial date (“run date”) in the upper left hand corner 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 pages of the CMR in the present case to the actual mailing date of “9/4/13.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the 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.

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 Departmental return address. 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."

9. The CMR in the present matter consists of 27 pages and lists 290 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 entries, with the exception of page 27, which has four 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.

10. A USPS representative affixed a postmark dated September 4, 2013 to each page of the CMR, circled the number "290" on page 27, to the right of the heading "Total Pieces Received at Post Office," and initialed or signed page 27.

11. Page 4 of the September 4, 2013 CMR indicates that a notice with certified control number 7104 1002 9730 0057 3050 and reference number L-040034320 was mailed to petitioner at the New York, New York, address listed on the notice. The CMR and the corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bear this same certified control number and petitioner's name and address as noted.

12. 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. 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. A clerk checks the first and last pieces of mail against the information on the CMR. The clerk 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. According to Mr. Ramundo, the affixation of the USPS postmark on each page of the CMR and the USPS employee's circling "290" on the last page of the CMR, and the employee's initialing of that page indicate that all of the 290 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on September 4, 2013.

13. According to both the Picard and Ramundo affidavits, a copy of the notice was mailed to petitioner on September 4, 2013, as claimed.

14. Petitioner did not respond to the Division's motion.

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 of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). Because 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. 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]).

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]). 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 Vil. 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*).

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 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 notice to petitioner's last known address on September 4, 2013. 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 sheet and CMR conforms with the address listed on petitioner's 2011 resident income tax return, which satisfies the "last known address" requirement. The Division's proper issuance of the notice gives rise to a rebuttable presumption that the notice was received by the taxpayer in due course (*see Tax Law § 1147 [a] [1]; Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011). Petitioner asserted in his request for conciliation and in his petition that he did not receive the notice. However, petitioner has offered no evidence in support of his claim. Accordingly, petitioner's denial of 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 314 [3d Dept 1986]). It is therefore concluded that the Division properly mailed the notice on September 4, 2013, 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]). Petitioner's request for conciliation conference, filed on September 10, 2019, was thus untimely and properly dismissed by BCMS.

G. The Division's motion for summary determination is granted, the petition of Jason J. Denton is denied, and the September 27, 2019, conciliation order issued by BCMS is sustained.

DATED: Albany, New York
June 18, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE