

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BORINQUENYA DELI RESTAURANT, INC. : DETERMINATION
DTA NO. 829635
for Revision of a Determination or for Refund of New :
York State Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Tax Period December 1, 2015 :
through February 28, 2018. :
:

Petitioner, Borinquenya Deli Restaurant, Inc., 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, 2015 through February 28, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Eric Gee, Esq., of counsel), brought a motion, dated April 10, 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 Balisok & Kaufman PLLC. (Joseph Y. Balisok, Esq., of counsel), 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, Dennis M. Galliher, 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 Request for conciliation conference filed by petitioner, Borinquenya Deli Restaurant, Inc., protesting a notice of determination, dated February 11, 2019, and bearing assessment identification number L-049455814 (notice). The notice is addressed to petitioner at an address in Brooklyn, 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, signed by petitioner's president and dated August 23, 2019, was mailed by petitioner to BCMS via United States Postal Service (USPS) Priority Mail-2 Day, and is stamped as received by BCMS on August 26, 2019.

3. On September 13, 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 February 11, 2019, but the request was not mailed until August 23, 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. The petition is dated as signed by petitioner's president on October 7, 2019, was mailed via USPS Priority Mail on October 8, 2019, and is stamped as received by the Division of Tax Appeals on October 15, 2019. The petition challenges the substantive basis for the issuance of the assessment in question.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affidavit of Eric Gee, Esq., dated April 10, 2020; (ii) an affidavit, dated March 16, 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 February 11, 2019; (iv) an affidavit, dated March 16, 2020, of Susan Saccocio, a supervisor in the Division's mail room; (v) a copy of the February 11, 2019 notice with the associated mailing cover sheet; (vi) a copy of petitioner's request for conciliation conference, mailed to BCMS by in a Priority Mail 2 Day envelope postmarked August 23, 2019; and (vii) a copy of petitioner's New York State and local quarterly sales and use tax return (form ST- 100) for the sales tax quarterly period spanning September 1, 2018 through November 30, 2018, which lists the same Brooklyn, New York, address for petitioner as that listed on the notice.

6. Mr. Gee's affidavit asserts that petitioner's form ST-100 was filed on January 1, 2019, and is the last return filed by petitioner before the notice was issued. Review of the transaction and payment details set forth on page three of that form confirm this assertion.

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 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 "2/11/19," and that change is set forth in the upper right corner of such pages. 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 28 pages and lists 303 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 entries, with the exception of page 28, which has six 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 the USPS Colonie Center, New York, postmark, dated February 11, 2019, to each page of the CMR, handwrote the number "303" on page 28, to the

right of the heading "Total Pieces Received at Post Office," and initialed or signed each page of the CMR, including page 28.

11. Page 9 of the February 11, 2019 CMR indicates that a notice with certified control number 7104 1002 9730 0345 2543 and reference number L-049455814 was mailed to petitioner at the Brooklyn, 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. Likewise, page 9 of the CMR indicates that a notice with certified control number 7104 1002 9730 0345 0512 and reference number L-049455814 was mailed to petitioner's then-representative, Yehad M. Abelaziz, at his Brooklyn, New York, address.

12. The affidavit of Susan Saccocio describes the general operations and procedures within the Division's mail room. Ms. Saccocio has been in her position as a manager in the Division's mail room since 2017, has been employed in the mail room 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. 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. 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 Ms. Saccocio, the affixation of the USPS postmark on each page of the CMR and the USPS employee's handwritten number "303" on the last page of the CMR, together with the employee's initialing of that page indicate that all of the 303 articles of mail listed on the CMR, including the articles addressed to petitioner, and to petitioner's then-representative, were received by the USPS for mailing on February 11, 2019.

13. According to both the Picard and Saccocio affidavits, a copy of the notice was mailed to petitioner on February 11, 2019, 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 February 11, 2019. 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 form ST – 100, filed for the tax period immediately preceding the issuance of the notice at issue, 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 made no assertion in either its request for a BCMS conference, or in its petition, that the notice was not received. Furthermore, petitioner did not respond to the instant motion. Accordingly, with no claim and no evidence that the properly issued notice was not received, there is no basis upon which to conclude otherwise so as to 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 February 11, 2019, 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 August 23, 2019, was thus untimely and properly dismissed by BCMS.

G. The Division's motion for summary determination is granted, the petition of Borinquena Deli Restaurant, Inc., is denied, and the September 13, 2019, conciliation order issued by BCMS is sustained.

DATED: Albany, New York
August 6, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE