

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
HILLARY HULTEEN

DETERMINATION
DTA NO. 830051

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 May 31, 2018.

Petitioner, Hillary Hulteen, 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 May 31, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), brought a motion dated September 13, 2021, seeking summary determination, in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Sales Tax Defense LLC (Mark L. Stone, CPA),¹ filed an affirmation of Mark L. Stone, CPA, and annexed exhibits in response to the motion for summary determination. The 90-day period for issuance of this determination commenced on October 15, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection

¹ On June 25, 2020, petitioner executed a New York State and New York City Power of Attorney form, POA-1, that appointed Mark Stone, CPA, MST, and Jennifer Koo, Esq., Sales Tax Defense LLC, as her representatives for all tax types and all years, periods, or transactions (Stone power of attorney). However, when she executed the Stone power of attorney, petitioner did not revoke a prior New York State and New York City Power of Attorney form, form POA-1, that appointed Christopher Kelly, Anchin, Block & Anchin LLP, as her representative with respect to all tax types for all tax periods (*see* findings of fact 6 [vi] and 7).

with this matter, Winifred M. Maloney, 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 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 (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Hillary Hulteen, in protest of a notice of determination, dated March 20, 2020, and bearing assessment ID number L-051347885 (notice). The notice assessed sales and use taxes for the period December 1, 2015 through May 31, 2018. It was issued to petitioner as an officer or responsible person of Lafayette Glass Company Inc., "for taxes determined to be due in accordance with sections 1138 (a), 1131 (1), and 1133 of the New York State Tax Law." The notice is addressed to "HULTEEN-HILLARY" at an address in West Islip, New York. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0120 9415.

2. A copy of the notice was also sent to petitioner's representative, Christopher Kelly, under a mailing cover sheet that bore certified control number 7104 1002 9730 0120 9378 and the following address:

"CHRISTOPHER KELLY
ANCHIN, BLOCK & ANCHIN LLP
ANCHIN-1375 BROADWAY
NEW YORK, NY 10018."

3. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner's representative, Mark L. Stone, CPA, and was dated June 26, 2020. The request was faxed to and received by BCMS on June 29, 2020.

4. On September 4, 2020, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000321199) to petitioner. The conciliation order determined that petitioner's protest of the subject 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 March 20, 2020, but the request was not faxed until June 29, 2020, or in excess of 90 days, the request is late filed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on September 10, 2020.

6. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated September 13, 2021, of Lori P. Antolick, Esq., the Division's representative; (ii) an affidavit, dated August 26, 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 March 20, 2020; (iv) an affidavit, dated August 26, 2020, of Susan Saccocio, a manager in the Division's mail room; (v) copies of the notice mailed to petitioner and her representative with the associated mailing cover sheets; (vi) a copy of the power of attorney form, dated January 1, 2020, authorizing Mr. Kelly to represent petitioner with respect to “[a]ll tax types” for “[a]ll tax periods,” that listed Mr. Kelly's New York, New York, address; (vii) a copy of petitioner's request for conciliation conference; and (viii) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2018, electronically filed on October 15, 2019, which lists the same West Islip, New York,

address for petitioner as that listed on the notice, the request for conciliation conference and the petition,² except that petitioner's address on the notice includes an additional four zip code digits to petitioner's five-digit zip code. According to the affirmation of Ms. Antolick, the 2018 resident income tax return was the last return filed with the Division by petitioner before the notice was issued.

7. Attached to Ms. Antolick's affirmation is a copy of the power of attorney form on file with the Division when the notice was issued. On the power of attorney form, petitioner's representative's address was listed as Christopher Kelly, Anchin, Block & Anchin, Anchin-1375 Broadway, New York, NY 10018. It is noted that on the power of attorney appointing Mr. Kelly as her representative, petitioner's same West Islip, New York address had the street abbreviated as "Davison LN E", and included an additional four zip code digits to petitioner's five-digit zip code.

8. 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is

² The street name of petitioner's address is spelled out as Davison Lane East on the request, the petition, and the Stone power of attorney; however, it is abbreviated as "Davison LN E" on the notice and petitioner's 2018 income tax return.

expressed as the year, Julian day of the year, and military time of day, in this case “20200740640.” Following the Division’s general practice, this date was manually changed on the first and only page of the CMR in the present case to “3/20/20.” In addition, as described by Ms. Picard, the CMR for the notices issued on March 20, 2020, including the notice issued to petitioner and her representative, consists of one cut sheet page. The page number of the CMR is noted in the upper right corner of page as “PAGE: 1.”

9. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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.”

10. The CMR in the present matter consists of one page and lists 5 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A United States Postal Service (USPS) employee affixed a postmark dated March 20, 2020 to the one-page CMR. Beneath the preprinted heading “Total Pieces Received at Post Office,” the USPS employee handwrote “5” and initialed or signed the one-page CMR.

11. The one-page CMR indicates that a notice with certified control number 7104 1002 9730 0120 9415, and reference number L-051347885 was mailed to petitioner at the West Islip, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and petitioner's name and address as noted.

12. The one-page CMR also indicates that a notice with certified control number 7104 1002 9730 0120 9378, and reference number L-051347885 was mailed to petitioner's representative, Christopher Kelly, at "ANCHIN-1375 BROADWAY, NEW YORK, NY 10018." The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit "B," bears this certified control number and the following name and address:

"CHRISTOPHER KELLY
ANCHIN, BLOCK & ANCHIN LLP
ANCHIN-1375 BROADWAY
NEW YORK, NY 10018."

13. The affidavit of Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom 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 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. As noted, the one-page CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark of March 20, 2020 and the USPS employee’s initials or signature. On the one-page CMR, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 5 and beneath “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten entry “5,” indicating 5 pieces of mail were received by the USPS.³

14. According to the Picard and Saccocio affidavits, copies of the notice were mailed to petitioner and her representative on March 20, 2020, as claimed.

15. In opposition to the Division’s motion for summary determination, petitioner submitted the affirmation of her representative, Mark L. Stone, CPA, with two attachments: a copy of “[a] message from Commissioner Schmidt on our efforts to combat COVID-19 March 20, 2020 (afternoon)” (attachment A), and a copy of the Division’s affidavit of Susan Saccocio, dated August 26, 2020, (attachment B). Mr. Stone, in his affirmation, made claims regarding the presence of “Tax Department” employees in its offices beginning March 16, 2020, and Commissioner Schmidt’s “directive to reduce in office staff.”

16. The text of the “message from Commissioner Schmidt on our efforts to combat COVID-19 March 20, 2020 (afternoon)” follows:

“Colleagues:

We continue to respond to the COVID-19 challenge.

³ The illegible initials or signature of the USPS employee appear to the right of the handwritten number “5.”

Beginning on this Monday, March 23, 2020, we will be reducing our on-site staffing to critical functions.

These critical functions, listed below, are related to the department's COVID-19 response efforts and certain depository and return processing operations.

All other work units will work entirely from remote locations, without charge to accruals. All of us must do what we can to advance the mission of the department and interests of the State during these challenging times.

Again, this directive will begin on Monday and remain in effect until further notice.

Managers and supervisors should communicate this directive to staff before the close of business today.

Thank you for your cooperation, and for your continued dedication and professionalism.”

It is noted that the copy of Commissioner Schmidt's message, attached to Mr. Stone's affirmation, appears to be a redacted copy of a longer message.⁴

CONCLUSIONS OF LAW

A. 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]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (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

⁴ Commissioner Schmidt's message states that critical functions are listed below. However, the copy in the record does not include the list of critical functions.

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*).

C. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. 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 the 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, 1966). This is because, absent a timely protest, a notice of deficiency 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 request for conciliation conference 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 (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 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).

E. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

F. Here, the Division introduced proof sufficient to establish the mailing of the notice to petitioner's last known address on March 20, 2020. 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 conform with the address listed on petitioner's 2018 resident income tax return filed which satisfies the "last known address" requirement. While it is noted that the Division added four additional zip code digits to petitioner's zip code as reflected on her 2018 resident income tax return filed, such difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2011).

G. In opposition to the Division's motion, petitioner filed the affirmation of her representative, Mark T. Stone, CPA. Mr. Stone's affirmation has no evidentiary value as only attorneys, physicians, osteopaths, dentists, or individuals physically located outside the United States are authorized to submit affirmations (*see CPLR 2106*). It does not appear that Mr. Stone satisfies any of these requirements. As for the "message from Commissioner Schmidt on our efforts to combat COVID-19 March 20, 2020 (afternoon)" attached to Mr. Stone's affirmation, there is nothing in this message that supports any claim that the Division's standard mailing procedures were affected by COVID-19 on March 20, 2020, the issuance date of the subject notice.

H. It is therefore concluded that the Division properly mailed the notice on March 20, 2020, 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's request for conciliation conference was filed on June 26, 2020. This date falls after the 90-day period of limitations for the filing of such a request and was properly dismissed by the September 4, 2020 conciliation order issued by BCMS.

I. 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 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 Kushner*, Tax Appeals Tribunal; October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]).

Here, the evidence demonstrated that the notice was sent by certified mail to Christopher Kelly, petitioner's representative, at his last known address on March 20, 2020, thus fulfilling the case law requirements for doing so.

J. The Division of Taxation's motion for summary determination is hereby granted, the petition of Hillary Hulteen is denied, and the September 4, 2020 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
January 13, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE