

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SOO YOUNG LEE :
For Revision of Determinations or for Refund of Sales : **DETERMINATION**
and Use Taxes under Articles 28 and 29 of the Tax : **DTA NO. 830098**
Law for the tax periods December 1, 2017 through :
May 31, 2018, September 1, 2018 through February :
28, 2019, and September 1, 2019 through November :
30, 2019.

Petitioner, Soo Young Lee, 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 December 1, 2017 through May 31, 2018, September 1, 2018 through February 28, 2019, and September 1, 2019 through November 30, 2019.+

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Eric Gee, Esq., of counsel), brought a motion on June 7, 2022, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). Petitioner, appearing by Isaac Sternheim & Co. (Isaac Sternheim, CPA), sent a response to the motion on June 16, 2022. The 90-day period for issuance of this determination commenced on July 7, 2022. 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 notices of determination.

FINDINGS OF FACT

1. Petitioner, Soo Young Lee, filed a 2018 New York nonresident and part-year resident income tax return, form IT-203 (2018 return) on April 15, 2019, providing an address in Edgewater, New Jersey.

2. The Division of Taxation (Division) issued petitioner two notices of estimated determination, each dated January 30, 2020, asserting petitioner is a responsible person for BLKSQ LLC. Assessment notice number L-051195076 asserted \$750.00 in estimated tax, plus interest and penalties for the tax period September 1, 2018, through November 30, 2018. Assessment notice number L-051195075 asserted \$750.00 in estimated tax, plus interest and penalties, for the tax period December 1, 2018 through February 28, 2019.

3. The Division issued petitioner two notices of determination, each dated May 4, 2020, asserting that petitioner is a responsible person for Baba W14 Corp. Assessment notice number L-051435697 asserted \$8,034.36 in tax, plus interest and penalties, for the tax period March 1, 2018 through May 31, 2018. Assessment notice number L-051435698 asserted \$3,529.50 in tax, plus interest and penalties, for the tax period December 1, 2017 through February 28, 2018.

4. The Division issued petitioner a notice of estimated determination, dated May 22, 2020, and bearing assessment notice number L-051449436 for estimated tax of \$15,738.13, plus interest and penalty. Petitioner was assessed as a responsible person of Mr Wooh LLC, for the tax period September 1, 2019 through November 30, 2019.

5. All of the notices were addressed to petitioner at the same Edgewater, New Jersey, address as was listed on the 2018 return.

6. On September 10, 2020, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. Petitioner provided the same Edgewater, New Jersey, address on her request as was on the notices.

7. On October 2, 2020, 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 [sic] issued on 1/30/2020; 5/4/2020 and 5/22/2020, but the request was not mailed until September 10, 2020, or in excess of 90 days, the request is late filed.”

8. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on October 13, 2020 and an amended petition on or about January 7, 2021. In the amended petition, petitioner asserted she never received the original assessments, she was never an officer of the entities, and that they were started fraudulently in her name.

9. On June 7, 2022, the Division filed a motion seeking the dismissal of the petition, or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, and 3009 (a) and (b) of the Rules. In support of the motion and to show proof of proper mailing of the notices, the Division provided the following documents: (i) an affirmation of Eric Gee, an attorney in the Office of Counsel of the Division, dated June 7, 2022; (ii) three affidavits of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Management Analysis and Project Services Bureau (MAPS), all sworn to on March 19, 2021; (iii) a “Certified Record for Presort Mail – Assessments Receivable” (CMR) postmarked January

30, 2020 (CMR 1); (iv) a “Certified Record for Presort Mail – Assessments Receivable” postmarked May 4, 2020 (CMR 2); (v) a “Certified Record for Presort Mail – Assessments Receivable” postmarked May 22, 2020 (CMR 3); (vi) three affidavits of Susan Saccocio, a manager of the Division’s mail room, sworn to on March 25, 2021; (vii) copies of the notices mailed to petitioner with the associated mailing cover sheets; (viii) a copy of the first page of petitioner’s request for conciliation conference dated September 9, 2020; (ix) a copy of the conciliation order dismissing request issued by BCMS on October 2, 2020; (x) a copy of a consolidated statement of tax liabilities dated August 19, 2020 listing the notices as subject to collection; and (xi) a copy of petitioner’s 2018 return.

10. Mr. Gee asserts in his affirmation that petitioner’s 2018 return was filed on April 15, 2019, and that this was the last return filed before the Division issued the notices. He also avers that the notices were issued to petitioner’s last known address in Edgewater, New Jersey.

11. Deena Picard has been the Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS) since May 2017. She is also a Data Processing Fiscal Systems Auditor 3 and has held that position since February 2006. In performing her duties for both positions, Ms. Picard has used the Division’s electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of determination and notices of estimated determination. 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. Ms. Picard’s affidavits set forth the Division’s general practices and procedures for generating and issuing statutory notices. The procedures are identical in each affidavit.

12. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

13. Each batch of notices is accompanied by a CMR. The CMR lists each notice in the order the notices are generated in the batch. The certified control number is listed on the CMR under the heading entitled "Certified No." The statutory notice 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." Each CMR and associated batch of statutory notices are forwarded to the mail room together.

14. All pages of each of the three CMRs are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division after mailing. The pages of the CMRs stay banded together unless otherwise ordered.

15. 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. The page numbers of the CMRs run consecutively, starting with "Page 1," and are noted in the upper right corner of each page.

16. Susan Saccocio, a manager in the Division's mail room, describes the mail room's general operations and procedures in her affidavit as they relate to statutory notices. Ms.

Saccocio has been a manager in the mail room since 2017. As a mail room manager, Ms. Saccocio is knowledgeable regarding past and present office procedures as they relate to statutory notices. Ms. Saccocio's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the United States Post Office.

17. The mail room receives statutory notices that are ready for mailing in an "Outgoing Certified Mail" area. The mail room also receives the corresponding CMR for each batch of notices. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet in a windowed envelope. That staff member then weighs, seals, and places postage on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the CMR. A clerk will also perform a random review of up to 30 pieces of certified mail 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.

18. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

January 30, 2020 Notices

19. CMR 1, for the notices issued by the Division on January 30, 2020, including the notices at issue herein, consists of 24 pages. Each page consists of 11 entries with the exception of page 24, which contains 5 entries. Ms. Picard notes that the copy of CMR 1 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.

20. The actual mailing date as handwritten on the first and last page of CMR 1 was “1/30/20.” This was done to ensure that the date on CMR 1 conformed with the actual date that the statutory notices and CMR 1 were delivered into the possession of the USPS.

21. A USPS representative affixed a postmark, dated January 30, 2020, to each page of CMR 1. All of the postmarks included the following language: “USPS Colonie Center Albany NY 12205.” A USPS representative wrote “258” on page 24 next to the heading “Total Pieces Received at Post Office,” and initialed or signed the page.

22. Page 1 of CMR 1 indicates that notice L-051195075 with certified control number 7104 1002 9730 0082 6552, and notice L-051195076 with certified control number 7104 1002 9730 0082 6569 were mailed to petitioner at her Edgewater, New Jersey, address. The corresponding mailing cover sheets, attached to the Picard affidavit with the notices as exhibit “B,” bear these certified control numbers, petitioner’s name, and her address as stated above.

23. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on January 30, 2020.

24. Ms. Saccocio avers that each page of the CMR in exhibit “A” of the Picard affidavit contains a postmark, and that a USPS employee initialed or signed page 24 of CMR 1 and wrote the total number of pieces of certified mail. A review of CMR 1 confirms this assertion.

25. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including CMR 1, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on January 30, 2020, an employee of the mail room delivered two pieces of certified mail addressed petitioner at her Edgewater, New Jersey, address in sealed postpaid envelopes for delivery. She also stated CMR 1 was delivered to the USPS on January 30, 2020 and returned to the Division. Ms. Saccocio attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on January 30, 2020.

May 4, 2020 Notices

26. CMR 2 for the notices issued by the Division on May 4, 2020, including the notices at issue herein, consists of 37 pages. Each page consists of 11 entries with the exception of page 37, which contains 4 entries. Ms. Picard notes that the copy of CMR 2 that is attached to her affidavit regarding these notices has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

27. The actual mailing date as handwritten on the first and last page of CMR 2 was “5/4.” This was done to ensure that the date on CMR 2 conformed with the actual date that the statutory notices and CMR 2 were delivered into the possession of the USPS.

28. A USPS representative affixed a postmark, dated May 4, 2020, to each page of CMR 2. All of the postmarks included the following language: “USPS Colonie Center Albany NY 12205.” A USPS representative wrote “400” on page 37 next to the heading “Total Pieces Received at Post Office,” and initialed or signed the page.

29. Page 1 of CMR 2 indicates that notice L-051435697 with certified control number 7104 1002 9730 0144 0214, and notice L-051435698 with certified control number 7104 1002 9730 0144 0221 were mailed to petitioner at her Edgewater, New Jersey, address. The corresponding mailing cover sheets, attached to the Picard affidavit with the notices as exhibit “B,” bear these certified control numbers, petitioner’s name, and her address as stated above.

30. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on May 4, 2020.

31. Ms. Saccocio avers that each page of CMR 2 in exhibit “A” of the Picard affidavit contains a postmark, and that a USPS employee initialed or signed page 37 of CMR 2 and wrote the total number of pieces of certified mail. A review of CMR 2 confirms this assertion.

32. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including CMR 2, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on May 4, 2020, an employee of the mail room delivered two pieces of certified mail addressed petitioner at her Edgewater, New Jersey, address in sealed postpaid envelopes for delivery. She also stated CMR 2 delivered to the USPS on May 4, 2020 was returned to the Division. Ms. Saccocio attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on May 4, 2020.

May 22, 2020 Notice

33. CMR 3 for the notices issued by the Division on May 22, 2020, including the notice issued herein, consists of 61 pages. Each page consists of 11 entries with the exception of page 61, which contains no entries. Ms. Picard notes that the copy of CMR 3 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.

34. The actual mailing date as handwritten on the first and last page of CMR 3 was “5/22/20.” This was done to ensure that the date on CMR 3 conformed with the actual date that the statutory notices and CMR 3 were delivered into the possession of the USPS.

35. A USPS representative affixed a postmark, dated May 22, 2020, to each page of CMR 3. All of the postmarks included the following language: “Colonie Center Albany NY 12205.” A USPS representative wrote “660” on page 61 next to the heading “Total Pieces Received at Post Office,” and initialed or signed the page.

36. Page 2 of CMR 3 indicates that notice L-051449436 with certified control number 7104 1002 9730 0148 8926 was mailed to petitioner at her Edgewater, New Jersey, address. The corresponding mailing cover sheet, attached to the Picard affidavit with the notice as exhibit “B,” bears this certified control number, petitioner’s name, and her address as stated above.

37. Ms. Picard avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division on May 22, 2020.

38. Ms. Saccocio avers that each page of CMR 3 in exhibit “A” of the Picard affidavit contains a postmark, and that a USPS employee initialed or signed page 61 of CMR 3 and wrote the total number of pieces of certified mail. A review of CMR 3 confirms this assertion.

39. Based on her review of the affidavit of Ms. Picard and the exhibits attached thereto, including CMR 3, and her personal knowledge of the procedures of the mail room, Ms. Saccocio stated that on May 22, 2020, an employee of the mail room delivered a piece of certified mail addressed to petitioner at her Edgewater, New Jersey, address in a sealed postpaid envelope for delivery. She also stated CMR 3 delivered to the USPS on May 22, 2020 was returned to the

Division. Ms. Saccocio attested that the procedures described in her affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on May 22, 2020.

40. In response to the motion, petitioner submitted an unsworn captioned document entitled “Petitioner’s Affidavit,” that was signed by her representative. In the document, Mr. Sternheim asserted that petitioner was the victim of identity theft by her ex-boyfriend who operated several businesses using her name. He stated that “[a]ll mail regarding the businesses was seized by [the ex-boyfriend] before she was able to see the documents.” Because of this, she was unable to respond to any assessments or file any appeals within the 90-day period allowed for appeal because she never saw the original assessments issued against her. Mr. Sternheim also asserted that the same issue existed with the Internal Revenue Service (IRS). However, upon receiving evidence of identify theft, the IRS cancelled the assessment. Petitioner claims that she did not discover the existence of the assessments until after her ex-boyfriend passed away from Covid-19. Petitioner’s ex-boyfriend’s attorney notified her that he had been retained to dispute the assessments because the boyfriend, who had been running the businesses, informed the attorney that petitioner was not involved in the businesses. Petitioner requested that the Division’s motion be dismissed and that the matter be heard by the Division of Tax Appeals on the issue of timeliness and as to whether or not petitioner was liable for the taxes owed by the businesses.

CONCLUSIONS OF LAW

A. The Division brings this motion to dismiss the petition under section 3000.9 (a) of the Rules or 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* findings of fact 7 and 8), the Division of Tax Appeals has jurisdiction over the petition and a motion for summary determination is the proper motion for relief if petitioner's request for conciliation conference was untimely (*see Matter of Panco Equipment Corp.*, Tax Appeals Tribunal, May 24, 2021).

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]).

Under the Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). "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 whether a material issue of fact exists or if there is even arguably such an issue (*Bershaw v Altman*, 100 AD2d 642, 643 [3rd Dept 1984]). 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 by motion (*Gerard v Inglese*, 11 AD2d 381, 383 [2nd 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,' . . . 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

C. Tax Law § 1138 (a) (1) authorizes the Division to mail notices of determination to a person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (*see also* Tax Law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of that notice by the person to whom it is addressed (*id.*). With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (*see* Tax Law § 1138 [a] [1]). A person also has the option of commencing a challenge to such 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]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (*see e.g. Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

D. Where the timeliness of a taxpayer’s request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’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 mailing procedure and that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*). Once the Division successfully establishes a presumption of receipt, the burden shifts to the taxpayer to

rebut the presumption by introducing evidence of actual non-receipt (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

E. Here, the Division has offered proof sufficient to establish the mailing of the notices to petitioner's last known address on January 30, 2020, May 4, 2020 and May 22, 2020, respectively. The CMRs have been properly completed and, together with proof of the Division's standard mailing procedure, constitute highly probative documentary evidence of both the dates and fact of mailing (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015; *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 CMRs, 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 the CMRs conform with the address listed on petitioner's 2018 return, which satisfies the "last known address" requirement.

F. The Division's proper issuance of the notices gives rise to a rebuttable presumption that the notices were received by the taxpayer in due course (see Tax Law § 1147 [a] [1]; *Matter of Bortnikova*, Tax Appeals Tribunal, March 1, 2021; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011). The taxpayer has the right to rebut the presumption, but such rebuttal must consist of more than a mere denial of receipt (*see Matter of Ruggerite, Inc. v State Tax Commn.*, 64 NY2d 688, 690 [1984]).

Petitioner asserted in her unsworn statement that was signed by her representative that she did not receive the notices because she was the victim of identity theft and her ex-boyfriend was opening the businesses in her name and taking the mail before she could see the notices. Petitioner did not submit any additional evidence in support of this assertion. She also did not

show that routine office practices were not followed or that they were performed so carelessly that it would be unreasonable to assume that the notices were mailed. Her unsworn statement, without more, is not sufficient to rebut the presumption of receipt (*see Matter of T. J. Gulf v State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]; *Ruggerite, Inc.*, 64 NY2d at 690). It is thus concluded that the Division properly mailed the notices on January 30, 2020, May 4, 2020 and May 22, 2020, respectively, 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 those dates (Tax Law §§ 170 [3-a]; 1138 [a] [1]).

G. Petitioner's request for conciliation conference was filed on September 10, 2020. This date falls after the 90-day period of limitations for the filing of such a request for each of the five notices. Consequently, the request was untimely and the same was properly dismissed by the October 2, 2020 order issued by BCMS. Petitioner has offered no claim or evidence to meet her burden to prove that any timely protest was filed before the 90-day period of limitations for challenging each of the five notices expired.

H. The Division's motion for summary determination is hereby granted, the petition of Soo Young Lee is denied and the October 2, 2020 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
September 29, 2022

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE