

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ADOM RENTAL TRANSPORTATION, INC.	:	DETERMINATION
AND YAW OSEI	:	DTA NOS. 830233
	:	AND 830256
for Revision of Determinations or for Refund of New York	:	
State Sales and Use Taxes Under Articles 28 and 29 of the	:	
Tax Law for the Period March 1, 2015 through	:	
February 28, 2018.	:	

Petitioners, Adom Rental Transportation, Inc. and Yaw Osei, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2015 through February 28, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel), brought motions dated July 6, 2021, seeking an order dismissing the petitions, or in the alternative, summary determination in the above-referenced matters pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Petitioner, Adom Rental Transportation, Inc., appearing by its owner Yaw Osei, and petitioner Yaw Osei, appearing pro se, did not respond to the Division of Taxation's motions. The 90-day period for issuance of this determination commenced on August 5, 2021. 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.

ISSUES

I. Whether petitioner, Adom Rental Transportation, Inc., filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination for the period March 1, 2015 through February 28, 2018.

II. Whether petitioner, Yaw Osei, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination for the period March 1, 2015 through February 28, 2018.

FINDINGS OF FACT

1. The subject of the motions of the Division of Taxation (Division) is the timeliness of petitioner Adom Rental Transportation, Inc.'s (Adom Rental) protest of a notice of determination, notice number L-050390498, dated August 16, 2019, and petitioner Yaw Osei's (Osei) protest of a notice of determination, notice number L-050394321, dated August 19, 2019, issued to him as an officer/responsible person of Adom Rental (collectively referred to as notices). The notices were addressed to petitioners, Adom Rental and Osei, at an address in Brooklyn, New York.¹

2. Petitioner Adom Rental filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice issued to it by way of facsimile on November 30, 2019. The request includes a fax machine date and time stamp indicating that the faxed transmission of the request was completed on November 30, 2019 at 7:33.²

¹ The notices were addressed to the same Brooklyn, New York address for both petitioners, except that the street for Adom Rental was listed as 23RD ST, with a zip code of 11224-2106 and the street for Osei was listed as 23ED STREET, with a zip code of 11224.

² There is no indication as to whether the transmission time was a.m. or p.m.

3. Petitioner Osei filed a request for conciliation conference (request), dated November 25, 2019, with BCMS in protest of the notice issued to him. Petitioner Osei's request was received by BCMS on December 5, 2019.

4. On January 3, 2020, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner Osei. The conciliation order determined that petitioner Osei'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 August 19, 2019, but the request was not mailed until December 3, 2019, or in excess of 90 days, the request is late filed.”

5. On January 8, 2021, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner Adom Rental. The conciliation order determined that petitioner Adom Rental'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 August 16, 2019, but the request was not faxed until November 30, 2019, or in excess of 90 days, the request is late filed.”

6. Petitioners filed petitions with the Division of Tax Appeals in protest of the conciliation orders on January 21, 2021.

7. To show proof of proper mailing of the notice issued to petitioner Adom Rental, the Division provided the following: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated June 14, 2021; (ii) a certified mail register titled: Certified Record For Presort Mail – Assessments Receivable” (CMR) postmarked August 16, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated June 17, 2021; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner Adom

Rental; (v) an affirmation of the Division's attorney, Eric R. Gee, dated July 6, 2021; and, (vi) a copy of the petitioner Adom Rental's New York State and Local Sales and Use Tax Web Filed Return (form ST-101), dated March 14, 2019, for the period March 1, 2018 through February 28, 2019, which lists the same address for petitioner Adom Rental as that listed on the notice, assessment number L-050390498. According to the affidavit of Mr. Gee, the sales tax return dated March 14, 2019 was the last return filed with the Division by petitioner Adom Rental before the subject notice was issued.

8. To show proof of proper mailing of the notice issued to petitioner Osei, the Division provided the following: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated June 11, 2021; (ii) a certified mail register titled: "Certified Record For Presort Mail – Assessments Receivable" (CMR) postmarked August 19, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated June 17, 2021; (iv) a copy of the notice with the associated mailing cover sheet addressed to petitioner Osei; (v) an affirmation of the Division's attorney, Eric R. Gee, dated July 6, 2021; and, (vi) a copy of the petitioner Osei's electronically filed New York State personal income tax return (form IT-201) for the year 2016, which lists the same address for petitioner Osei as that listed on the notice, assessment number L-050394321. According to the affidavit of Mr. Gee, the 2016 income tax return was the last return filed with the Division by petitioner Osei before the subject notice was issued to him.

9. The affidavits 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 8/16/19" for the CMR associated with the notice issued to petitioner Adom Rental and "8/19/19" for the CMR associated with the notice issued to petitioner Osei. 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.

10. 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."

11. The August 16, 2019 CMR consists of 16 pages and lists 168 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 August 16, 2019 to each page of the CMR, initialed and wrote the number “168” on the last page next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE”.

12. Page 10 of the CMR, dated August 16, 2019, indicates that a notice of determination with certified control number 7104 1002 9730 0001 0289 and assessment ID number L-050390498, was mailed to petitioner Adom Rental at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner Adom Rental’s name and address as noted.

13. The August 19, 2019 CMR consists of 21 pages and lists 223 certified control numbers along with corresponding assessment numbers, names and addresses.³ 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 August 19, 2019 to each page of the CMR, initialed and wrote the number “223” on the last page next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE”.

14. Page 11 of the CMR, dated August 19, 2019, indicates that a notice of determination with certified control number 7104 1002 9730 0001 2191 and assessment ID number L-050394321, was mailed to petitioner “OSEI-YAW” at the Brooklyn, New York, address listed

³ The CMR originally listed 224 certified control numbers. As noted in findings of fact 16 and 17, the preprinted number of total pieces received at the post office is crossed out and “223” is handwritten on the last page of the CMR.

on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner Osei’s name and address as noted.

15. The affidavits of Susan Saccocio describe 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 CMRs, indicating receipt by the post office. The USPS employee initialed the last page of the CMRs and affixed a postmark to each page of the CMRs. 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 CMRs. A review of the August 16, 2019 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the CMR.

16. On the August 19, 2019 CMR, the USPS employee crossed out the preprinted number “224” appearing next to the heading “total pieces and amounts” and wrote the number “223” on the last page next to the heading “Total Pieces Received at Post Office,” along with the

employee's initials or signature. According to Ms. Saccocio, the number of pieces received was changed from 224 to 223 to reflect that one piece of certified mail had been "pulled" from the mailing record. The affixation of the postmarks and the USPS employee's initials and handwritten number indicate that a total of 223 articles of mail listed on the CMR were delivered to the USPS on August 19, 2019.

17. Ms. Saccocio further explains that a piece of mail may be "pulled" for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pieces of mail "pulled" will be segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the CMR dated August 19, 2019 reflects that one piece of mail was "pulled." The piece that was pulled is listed on page 5 of the CMR. This piece of mail had been assigned certified control number 7104 1002 9730 0001 1491. A line was placed through the entry for this taxpayer after the statutory notice was "pulled." This deletion is reflected in the change of the total pieces received at the post office on page 21 of the CMR. No such mark is made on or near the listing for petitioner Osei.

18. According to the affidavits submitted, copies of the notices were properly mailed to petitioners Adom Rental and Osei at their Brooklyn, New York, addresses on the dates indicated as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings motions to dismiss the petitions under section 3000.9 (a) of the Rules of Practice and Procedure (Rules) or, in the alternative, motions for summary determination under section 3000.9 (b). As the petitions in this matter were filed within 90 days of the conciliation orders, the Division of Tax Appeals has jurisdiction over the petitions and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the

proper vehicle to consider the timeliness of petitioners' requests for conciliation conference.

This determination shall address the instant motions 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. Petitioners did not respond to the Division's motions. Accordingly, they are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99

AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioners have presented no evidence to contest the facts alleged in the Picard, Saccocio or Gee affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. 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 (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).

F. 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).

G. 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).

H. Here, the Division has offered proof sufficient to establish the mailing of the statutory notices to petitioners Adom Rental's and Osei's last known address on January 16, 2019 and January 19, 2019, respectively. The CMRs have been properly completed and therefore constitute 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 CMRs and thereby establish that the general mailing procedure was followed in these cases (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the addresses on the mailing cover sheets and CMRs conform with the addresses listed on petitioners' last filed returns, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the respective notices to petitioner Adom Rental on August 16, 2019, and to petitioner Osei on August 19, 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 those dates (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

I. Petitioner Adom Rental's request for conciliation conference was filed on November 30, 2019. Petitioner Osei's request for conciliation conference was filed on December 3, 2019.

