

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GABRIEL BROGAN-DILLON : DETERMINATION
 : DTA NO. 850126
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 September 1, 2009 through November 30, 2009. :

Petitioner, Gabriel Brogan-Dillon, 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 September 1, 2009 through November 30, 2009.

On November 6, 2023, petitioner, appearing by Sales Tax Defense LLC (Jennifer Koo, Esq.), brought a motion seeking summary determination in his favor, pursuant to section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. On December 5, 2023, the Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), filed a response to petitioner's motion and filed its own motion seeking an order dismissing the petition or, in the alternative, summary determination in its favor, pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed his response in opposition to the Division's motion, by January 15, 2024, which date began the 90-day period for the issuance of this determination.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Alexander Chu-Fong, Administrative Law Judge, renders the following determination.

ISSUES

I. 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.

II. If so, whether summary determination in petitioner's favor should be granted because no triable issues of fact exist, and the law requires judgment in his favor.

FINDINGS OF FACT

1. On August 12, 2013, the Division of Taxation (Division) issued to petitioner, Gabriel Brogan-Dillon, a notice of estimated determination, bearing assessment number L-039977409, for the period September 1, 2009 through November 30, 2009 (notice). The notice was issued to petitioner at an address in Brooklyn, New York.

2. On August 11, 2021, petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). On February 11, 2022, BCMS issued a conciliation order dismissing request, CMS No. 000335727 (conciliation order), which provided, in pertinent 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 8/12/13, but the request was not mailed until 8/11/21, or in excess of 90 days, the request is late filed.”

3. On April 20, 2022, petitioner filed a timely petition with the Division of Tax Appeals in protest of the order.

4. With his motion, petitioner submitted the following: (i) an affidavit from himself, Gabriel Brogan-Dillon, sworn to on November 6, 2023; (ii) a photocopy of a social security card (SS card) bearing petitioner's name and the date “10/23/2013;” and, (iii) an alleged consolidated statement of tax liabilities, dated July 21, 2021 (July 2021 statement).

5. The notice asserted additional tax due from petitioner in his capacity as an officer or responsible person of a Brooklyn, New York, business named, "Slim Lamb LLC," which, for the period at issue, did business as "Miracle Grill."

6. A form DTF-17-R application to renew sales tax certificate of authority, dated January 8, 2009 (application), lists petitioner as an owner of Slim Lamb LLC.

7. The application also lists petitioner's social security number (SSN). The fourth digit is listed as "3."

8. In his affidavit, petitioner stated that the fourth digit in his SSN is a "5," which conforms to the SS card.

9. In his affidavit, Petitioner states, "When I began receiving notices from the New York State Department of Taxation and Finance ('Tax Department'), I called the Tax department and gave the representative my social security number." He states that representative informed him that "there were no tax assessments associated with my name and social security number." Petitioner states that he "assumed the assessments were erroneously mailed to me" and that he "stopped receiving notices from the Tax Department for some time." When he began receiving notices again from the Division, he contacted his current representatives, who checked his online account with the Division. Petitioner states that his current representatives "informed me that my Tax Department online account does not list any tax assessments."

10. The July 2021 statement indicates that petitioner had no unpaid bills at the time or as of its creation.

11. Petitioner states that the assessment period was almost 14 years ago. He avers that he is prejudiced because he no longer has records or documentation from 2009, and that his memories of that time are now vague and "not as sharp as it was back then." Petitioner argues

that based on these facts, he was prejudiced against his ability to defend against the notice. Therefore, he argues that summary determination should be granted in his favor, and that the notice be cancelled.

12 The Division responded by cross-moving for summary determination. With its motion, it submitted the following: (i) an affirmation, dated December 5, 2023, of Elizabeth Lyons, Esq., an attorney in the Division's Office of Counsel; (ii) an affidavit, dated July 14, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated July 17, 2023, of Susan Ramundo, a manager in the Division's mail room; (iv) a "Certified Record for Presort Mail – Assessments Receivable" (CMR), postmarked August 12, 2013; (v) a copy of the notice, together with the associated mailing cover sheet and, (vi) a copy of petitioner's printout "address summary" from the Division's eMPIRE database (eMPIRE printout), which shows the same Brooklyn, New York, address as is on the notice, and indicates that the address was updated according to the United States Postal Service (USPS) National Change of Address service, with an effective date of July 5, 2013.

13. The Brooklyn, New York, address on the eMPIRE printout matches the address listed on the notice, the associated cover sheet, and the CMR.

14. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022 and has been the Principal Administrative Analyst since August 2022, and Director of MAPS since July 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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 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 page of the CMR in the present case to the actual mailing date of "8/12/13." 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.

15. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. 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 the 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."

16. The CMR, dated August 12, 2013, consists of 39 pages, with 11 entries per page, except for page 39, which contains 9 entries, and lists 427 certified control numbers along with corresponding assessment numbers, names, and addresses. Ms. Denier 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. A USPS representative affixed a postmark, dated August 12, 2013, to each page of the CMR, wrote the number "427" next to the heading "Total Pieces Received at Post Office" on page 39, and initialed or signed the last page of the CMR.

17. Page 18 of the CMR indicates that a notice with the reference number L 039977409 and certified control number 7104 1002 9730 0048 8804 was mailed to petitioner at the Brooklyn, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit "B," bears this certified control number, and petitioner's name and address as noted.

18. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an Associate Administrative Analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room regarding statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 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 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, each page of the

CMR attached to the Denier affidavit as exhibit “A” contains a USPS postmark dated August 12, 2013. In addition, Ms. Ramundo attests that the USPS employee’s initials or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicate that all 427 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on August 12, 2013.

19. According to the Denier and Ramundo affidavits, the notice was mailed to petitioner on August 12, 2013, as claimed.

CONCLUSIONS OF LAW

A. 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). Here, as the petitioner timely challenged the conciliation order, the Division’s motion must be construed as a motion for summary determination.

B. 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. A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

Thus, the movant “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 the Tax Appeals Tribunal noted in *Matter of United*

Water New York:

“Inasmuch 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 v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

C. To prevail against a motion for summary judgment, the opposing party must produce “‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman v City of New York*, 49 NY2d at 562).

D. A taxpayer may protest a notice of determination or notice of estimated 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 the BCMS “if the time to petition for such 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 or requests filed even one day late must be 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). Failure to file a petition or request for conciliation conference within the 90-day period after issuance of a notice of determination results in said notice becoming fixed and final (Tax Law § 1138 [a] [1]; *see also Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. However, proper mailing of a notice of determination is merely presumptive evidence of receipt by the taxpayer (Tax Law § 1147 [a] [1]). The taxpayer may rebut this presumption, but such rebuttal “must consist of more than a mere denial of receipt” (*Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]).

F. Here, the initial inquiry centers on whether the Division demonstrated the fact and date of the mailing of the notice to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To carry this burden, the Division must show proof of a standard procedure used 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 instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing, and issuing statutory notices. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR, to establish that the notice was mailed, as addressed, on August 12, 2013. Petitioner’s address on the notice, the corresponding mailing cover sheet, and the CMR all conform with the address listed on the eMPIRE printout, and petitioner stated that he received notices from the Division. Balancing the facts herein, the last known address standard has been met (*Matter of Katz*). It is concluded that the Division mailed the notice to petitioner on August 12, 2013, at his last known address prior to the issuance of the notice, which is sufficient to raise the rebuttable presumption of receipt.

H. Petitioner failed to carry his burden of rebutting the presumption of receipt (*see Matter of T.J. Gulf*, 124 AD2d at 315). In his affidavit supporting his motion for summary determination, petitioner states that he received notices from the Division and contacted them. Petitioner assumed that the Division acted in error, but did not confirm that the notice was cancelled by either filing a petition or a requesting for conciliation conference within 90 days. The statutory period continued to run and, as a result, the notice became fixed and final (*see* Tax Law §§ 170 [3-a], 1138 [a] [1]; *see also Matter of Lukacs; Matter of Sak Smoke Shop*). None of the arguments raised by petitioner challenge the Division's mailing proof or raise any material question regarding his receipt of the notice. Therefore, it must be concluded that the Division is entitled to summary determination because petitioner did not timely protest the notice.

I. 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 August 12, 2013 (*see* Tax Law §§ 170 [3-a]; 1138 [a]). Petitioner filed his request for conciliation conference on August 11, 2021. This date falls after the 90-day period of limitations for the filing of such a request. Therefore, it must be concluded that in the February 11, 2022, conciliation order, BCMS properly dismissed the request because it was untimely filed.

J. Since petitioner did not timely file his request for conciliation conference (*see* conclusion of law H), the merits of his arguments cannot be reached and, therefore, he is not entitled to summary determination in his favor.

K. The Division of Taxation's motion for summary determination is granted, the motion for summary determination by petitioner, Gabriel Brogan-Dillon, is denied, the petition of Gabriel Brogan-Dillion is denied, and the conciliation order, dated February 11, 2022, is sustained.

DATED: Albany, New York
April 4, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE