

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
ROMIK RUBINOV
for Redetermination of a Deficiency or for Refund of
New York State Personal Income Tax under Article 22
of the Tax Law for the Year 2020.

DETERMINATION
DTA NO. 850735

Petitioner, Romik Rubinov, 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, 2013 through November 30, 2015.

On March 20, 2024, the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), filed a motion pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The motion seeks an order dismissing the petition or, in the alternative, summary determination in its favor. The Division of Taxation submitted documents supporting its motion. Petitioner did not file a response by April 19, 2024, which date began the 90-day period for issuance of this determination. After due consideration of the submitted documents and filed pleadings, Alexander Chu-Fong, 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. On March 23, 2023, the Division of Taxation (Division) issued a notice of determination (notice), bearing assessment ID number L-057813455, to petitioner, Romik Rubinov. The notice asserts that petitioner was a person under a duty to collect, account for and remit sales and use taxes on behalf of “E CARS USA INC.”¹ It asserts that additional tax is due from this business for the period September 1, 2013 through November 30, 2015.

2. On October 26, 2023, petitioner protested the notice by filing a request for conciliation conference (Request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS).

3. On November 10, 2023, BCMS issued a conciliation order dismissing request (Dismissal Order), bearing CMS No. 000356127, which dismissed petitioner’s Request as untimely filed, stating:

“The Tax Law requires that a request be filed within 30 days from the date of the statutory notice. Since the notice(s) was issued on 3/23/2023, but the request was not received until 10/26/2023, or in excess of 30 days, the request is late filed.”

4. On November 21, 2023, petitioner protested the Dismissal Order by filing a petition with the Division of Tax Appeals.

5. On March 20, 2024, the Division filed a notice of motion, seeking either an order dismissing the petition or summary determination in its favor.

6. To show proof of proper mailing of the notice, the Division, by affirmation of Bruce D. Lennard, Esq. (Lennard Affirmation), dated March 19, 2024, submitted copies of the following with its motion papers: (i) the instant petition, postmarked November 21, 2023, with attachments; (ii) the Division’s answer in the instant matter, dated February 7, 2024; (iii) the

¹ In the Division’s motion papers, the underlying business name appears both capitalized and lower case. For consistency and ease of reference, it will be capitalized throughout this determination.

notice, dated March 23, 2023, along with the Division's "proof of mailing;" (iv) petitioner's Request, dated October 26, 2023, along with the Dismissal Order and its cover letter, both dated November 10, 2023; (v) a representation of petitioner's e-filed form IT-201 for tax year 2021 (2021 form IT-201), which was filed on April 12, 2022.

7. The notice lists an Oakland Gardens, New York, address for petitioner, which mirrors that listed on the Request, cover letter to the Dismissal Order, and petition. In its "EXPLANATION AND INSTRUCTIONS" section, the notice states: "Our records indicate that you are/were an Officer/Responsible Person of: E CARS USA INC." The notice provides instructions on how to protest the notice, indicating that petitioner has 30 days to do so: "You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 04/22/23." The notice lacks any explicit reference to fraud penalty.

8. The Division's proof of mailing consists of the affidavits and attachments of three individuals employed by the Division: Marianna Denier, Susan Ramundo, and Beth Levy.

9. Marianna Denier, in her affidavit (Denier Affidavit), states that she has served as a Principal Administrative Analyst since August 2022, and as Director of the Division's Management Analysis and Project Services Bureau (MAPS) since July 2022. MAPS is responsible for the receipt and storage of records, each called "Certified Record for Presort Mail - Assessments Receivable" (CMR). Ms. Denier possesses familiarity with the Division's Case and Resource Tracking System (CARTS), as well as the Division's past and present procedures as they relate to statutory notices. The Denier Affidavit has two attached exhibits: (i) pages 1, 6, and 11 of a CMR; and (ii) a copy of the notice with the associated mailing cover sheet.

10. The Denier Affidavit sets forth the Division's general practice and procedure for processing statutory notices. The Division generates statutory notices using CARTS, which it

then predates 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 general practice, an employee manually changes this date on the first and last pages of the CMR. In this case, an employee changed the date to March 23, 2023. In addition, as described by Ms. Denier, an employee bands all pages of the CMR together, when the documents are delivered to the mail room. The pages remain banded when the documents are delivered into possession of the United States Postal Service (USPS), then postmarked, and returned to the Division. The CMR stays banded unless otherwise ordered. Ms. Denier alleges that the page numbers of the CMR, located in the upper right-hand corner of each page, run consecutively, starting with "PAGE: 1."

11. Ms. Denier explains that 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 numbers are 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."

12. The Denier Affidavit states that the March 23, 2023, CMR indicates, on page 6, that one notice of determination, bearing "REFERENCE NO. L 057813455" was sent to petitioner at his Oakland Gardens, New York address, via certified mail using control number "9207 1041 0029 7300 7459 00." Ms. Denier states that the procedures described and followed and here constitute the normal and regular procedures of the Division, which were followed on the March 23, 2023.

13. The CMR for the batch of notices issued on March 23, 2023, including the notice addressed to petitioner, allegedly consists of 11 cut sheet pages. However, the attachment to the Denier Affidavit includes only pages 1, 6, and 11 of that CMR. Each of the provided pages includes, in its upper left corner, the preprinted year, Julian day of the year, and military time of day for the “run”. This run has a listing of 20230751700. Appearing in the upper right corner of pages 1 and 11 is the handwritten date “03/23/23,” indicating the manually inserted date of actual mailing. Each of the provided pages bears a March 23, 2023, postmark. Page 6 bears a column entitled “CERTIFIED NO” and displays the number “9207 1041 0029 7300 7459 00.” It also bears a “REFERENCE NO” column, which displays “L 057813455.” Page 11 of the CMR contains seven entries and, beneath them, appears the preprinted heading “TOTAL PIECES AND AMOUNTS,” to the right of which appear preprinted columns headed “PIECES,” “POSTAGE,” “FEE @ 3.45,” and “RR FEE @ .00.” These columns respectively reflect the preprinted number of pieces of mail, 117, as well as postage, 81.61, and fee amounts, 403.65, for the mail listed in this CMR. Immediately below this heading is the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE.” Nothing appears next to this heading. Immediately beneath this appears a postage mark, as well as the March 23, 2023, postmark. Appearing at the right of the postmark is a stamped box bearing the instruction, “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” Page 11 bears no marks that reflect the handwritten total of the pieces of mail or an initial.

14. Susan Ramundo, in her affidavit (Ramundo Affidavit), states that she is currently employed by the Division as an Associate Administrative Analyst and has been a manager at the Division’s mail room since 2017. In the Ramundo Affidavit, she describes the mail room’s general operations and procedures. The mail room receives the notices and places them in an

“Outgoing Certified Mail” area. Ms. Ramundo avers 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 listed on the CMR are checked against the information contained on the CMR. A staff member 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 CMR, indicating receipt by the post office. The Mail Processing Center 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.

15. According to the Ramundo Affidavit, pages 1, 6, and 11 of the March 23, 2023, CMR indicate that the Division mailed the notice to petitioner at the listed Oakland Gardens, New York, address, on that date in accordance with its standard procedure.

16. Beth Levy, in her affidavit (Levy Affidavit), states that she has served as a Legal Assistant 1 in the Division’s Office of Counsel since November 2022. As part of her duties, she prepares USPS forms 3811-A, entitled “request for delivery information / return receipt” (form 3811-A), or asks the Department’s mail room staff to make such requests on behalf of her office. The Levy Affidavit has attached two exhibits, copies of: (i) a form 3811-A, related to tracking number 9207 1041 0029 7300 7459 00, bearing a postmark of February 1, 2024; and (ii) correspondence from the USPS responding to the form 3811-A (USPS Response), dated February 1, 2024.

17. Ms. Levy states that she prepared the form 3811-A for the taxpayer in question and emailed it to the local USPS business service network representative. Ms. Levy describes the USPS Response as showing that the article bearing certified mail number 9207 1041 0029 7300 7459 00 was delivered on “03/25/2023 at 2:26PM to Oakland Gardens, NY 11364.” She further describes the proof in the USPS Response, stating: “It also shows the scanned signature image of the recipient which appears to be ‘RR’ and the address of the recipient has been written.”

18. The Lennard Affirmation states that the 2021 form IT-201 was the last return filed by petitioner with the Division before the notice was issued. Therefore, Mr. Lennard avers that it represents petitioner’s last known address at that time of issuance. The Oakland Gardens address listed on the 2021 form IT-201 matches the address as listed on the CMR, notice, Request, and the cover letter to the Dismissal Order, as well as on the petition.

SUMMARY OF THE PARTIES’ POSITIONS

19. The Division argues that petitioner filed the Request more than 30 days from the issuance of the statutory notice. It submits that as the Request must be deemed untimely, the Division of Tax Appeals lacks jurisdiction to review the notice. The Division accordingly requests that its motion be granted and that the petition be dismissed or that summary determination be made in its favor.

20. Petitioner did not file a response to the motion.

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

protested the Dismissal Order, the Division's motion must be construed as a motion for summary determination.

B. Section 3000.9 (c) of the Rules provides that the same provisions that apply to a motion for summary judgment pursuant to CPLR 3212 also apply to a motion for summary determination. 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]). The Tax Appeals Tribunal has stated:

“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*, 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. Herein, petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner introduced no evidence to contest the facts alleged in the Division's motion papers. Therefore, the facts introduced by the Division are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d at 449, citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

E. The statutory time frame for protesting a notice typically sets a 90-day period for requesting a conciliation conference (*see* Tax Law § 170 [3-a] [b]). However, if a fraud penalty is asserted pursuant to Tax Law § 1145 (a) (2), then the statutory period for requesting a conciliation conference reduces from 90 day to 30 days (Tax Law § 170 [3-a] [h]). It is well established that the statutory time limit for protesting a notice is strictly enforced. Protests filed even one day late are considered untimely (*see e.g. Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006, *confirmed* 50 AD3d 1187 [3d Dept 2008]; *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment. Consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of an untimely protest (*see e.g. Matter of Lord of Kings*, Tax Appeals Tribunal, January 30, 2020; *Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. The Division's motion raises the issue of the timeliness of petitioner's Request. Therefore, the initial inquiry is whether the Division carried its burden of demonstrating proper issuance of the notice by mailing the same, by certified or registered mail, to petitioner's last

known address (Tax Law § 1138 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is issued when it is properly mailed, and such notice is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and date of mailing of a statutory notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York*; *see Matter of Katz*).

G. 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 (Tax Law § 1147 [a] [1]). 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 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

H. Here, the Denier and Ramundo Affidavits establish the Division’s standard mailing procedure. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice on the indicated date (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). However, in the present matter, the record contains only three pages of what purports to be a longer multi-page computer generated CMR. Unlike the procedure described in the Denier Affidavit, the three pages of the CMR are not physically connected; the certified mail numbers appear to run consecutively on each page but not from page to page; and, it cannot be ascertained whether the pages bear consecutive

numbering. Moreover, the final page bears neither an initial nor other indication of the total pieces of mail received. As a result, the partial, uninitialed CMR does not establish that the standard procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

I. This flaw may be overcome by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the USPS Response accompanying the Levy affidavit shows that a copy of the notice at issue, addressed to petitioner, which was also listed on the CMR and his 2021 form IT-201, was delivered as addressed on March 25, 2023. This other evidence of mailing is sufficient to overcome the incomplete CMR and establishes the fact of mailing of the subject notice and the subsequent receipt by petitioner (*see e.g. Matter of Winners Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010, *confirmed* 89 AD3d 1166 [3d Dept 2011], *lv denied* 18 NY3d 807 [2012]). While the CMR is insufficient, the Levy Affidavit, form 3811-A, and USPS Response established actual delivery of the notice. Therefore, the 30-day period for petitioner to protest the notice began to run from the date of delivery (*see e.g. Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

J. As previously discussed, the petitioner's 2021 form IT-201 lists an address that matches the notice, its corresponding cover sheet, and the CMR. Additionally, this address also mirrors that listed on the cover letter to the Dismissal Order and its cover sheet, as well as that on the petition. Accordingly, this proof satisfies the "last known address" requirement (Tax Law § 1138 [a] [1]).

K. Given the totality of the submitted proof, it is concluded that the Division established that it properly mailed the notice by certified mail to petitioner's last known address (*id.*).

Accordingly, the statutory period for petitioner to file a protest began to run from the date of delivery, i.e., March 25, 2023.

L. Here, the notice properly appraises petitioner of the relevant time to file a protest, which is 30 days. The notice provides the date of April 22, 2023, which constitutes 30 days from the issuance of the notice, i.e., March 23, 2023. However, as discussed above, due to the Division's proof of mailing, the statutory time frame began to run from the date of delivery, i.e., March 25, 2023, which provided petitioner until April 24, 2023, to file a request for conciliation conference. In this instance, he did not.

M. Petitioner filed the Request on October 26, 2023, or approximately 215 days after the date of delivery. As the Request was untimely, it was properly dismissed by BCMS (*see* Tax Law § 170 [3- a] [h]; 20 NYCRR 4000.5 [c] [4]). It must be concluded that the Division of Tax Appeals lacks jurisdiction to consider the underlying merits of this protest (*see e.g. Matter of Lord of Kings; Matter of Ahmed; Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

N. The Division's motion for summary determination is granted, the petition of Romik Rubinov is denied, and the conciliation order dismissing request, dated November 10, 2023, is sustained.

DATED: Albany, New York
June 6, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE