

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WILLIAM CHIN : ORDER
 : DTA NO. 825951
 :
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 June 1, 2006 through November 30, 2011. :

Petitioner, William Chin, 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 June 1, 2006 through November 30, 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (David Gannon, Esq., of counsel), brought a motion dated April 1, 2013 seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Richard S. Chiu, CPA, did not respond to the Division of Taxation's motion. 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 order.

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. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of two notices of determination dated April 2, 2013 and bearing assessment identification numbers L-039186510 and L-039186567. The notices are addressed to petitioner, William Chin, at an address in Fresh Meadows, New York.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the April 2, 2013 notices of determination. The request was mailed to BCMS on September 26, 2013.

3. On October 18, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices of determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on April 2, 2013, but the request was not mailed until September 26, 2013, or in excess of 90 days, the request is late filed.

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on November 1, 2013.

5. To show proof of proper mailing of the April 2, 2013 notices of determination, the Division provided the following with its motion papers: i) an affidavit, dated February 7, 2014, of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) pages numbered 1, 179, and 316 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), each legibly postmarked April 2, 2013; (iii) an affidavit, dated February 7, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center;

(iv) an affidavit, dated February 7, 2014, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) two Postal Service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS responses to such requests dated January 30, 2013; (vi) a copy of the April 2, 2013 notices of determination with the associated mailing cover sheets; and (vii) petitioner's resident income tax return for the year 2011, dated October 15, 2012, which lists the same address for petitioner as that listed on the subject notices. The 2011 return was the last return filed with the Division by petitioner before the notices were issued.

6. The affidavit of Daniel A. Maney, who has been in his current position since January 2010, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 was manually changed on the first page of the CMR in the present case to the actual mailing date of "4/2/13." In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. According to Mr. Maney, the page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

7. 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 PO Address."

8. According to the Maney affidavit, the CMR in the present matter consists of 316 pages. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 316. Mr. Maney adds that the total number of statutory notices mailed pursuant to the CMR was 3,475.

9. Attached to the Maney affidavit, as exhibit "A," is a copy of pages 1, 179, and 316 of the CMR issued by the Division on April 2, 2013. Pages 1 and 316 have a handwritten entry referring to April 2, 2013 on the top; however, page 179 does not have a similar entry.

10. Page 179 of the CMR indicates that two notices of determination with certified control numbers 7104 1002 9730 1528 3975 and 7104 1002 9730 1528 3982 and reference number L 039186510 and L 039186567, respectively, were mailed to petitioner at the Fresh Meadows, New York, address listed on the subject notices of determination.¹ The corresponding mailing cover sheets, attached to the Maney affidavit as exhibit "B," bear these certified control numbers and petitioner's name and address as noted.

¹ The Maney affidavit states that "Page 5 of Exhibit 'A'" indicates the subject notices with the specified certified control numbers and reference numbers. It is noted that there is no page 5 of Exhibit A. This appears to be an oversight or typographical error, as the subject notices are actually listed on page 179 of Exhibit A.

11. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier 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 listed on the CMR 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 CMR, indicating receipt by the post office. The 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.

12. Each of the three pages of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of April 2, 2013. On page 316, corresponding to "Total Pieces and Amounts," is the preprinted number 3,475, and next to "Total Pieces Received At Post Office" is the handwritten entry "3,475" along with initials or a signature. According to Mr. Peltier, the affixation of the postmarks and the Postal Service employee's initials indicate that all 3,475 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS on April 2, 2013.

13. According to both the Maney and Peltier affidavits, a copy of the subject notices were mailed to petitioner on April 2, 2013, as claimed.

14. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject notices of determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 1528 3975 and 7104 1002 9730 1528 3982. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9730 1528 3975 and addressed to petitioner was delivered to an address in Fresh Meadows, New York, on April 6, 2013. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9730 1528 3982 was delivered to an address in Kew Gardens, New York, on May 15, 2013. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article numbers 7104 1002 9730 1528 3975 and 7104 1002 9730 1528 3982. Exhibit "B" attached to the Corina affidavit is the USPS responses to the Division's request. The response for article number 7104 1002 9730 1528 3975 indicates delivery of the same article on April 6, 2013 to an address in Fresh Meadows, New York, and identifies the recipient as "Chin William" and bears a copy of his signature in that capacity. The response for article number 7104 1002 9730 1528 3982 indicates delivery of the same article on May 15, 2013 to an address of "Queens District Office" in Kew Gardens, New York, and identifies the recipient as "Department of Taxation and Finance."

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, 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* Finding of Fact 4), the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9(b) of the

Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This order shall address the instant motion as such.

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]).

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. "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 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. 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 the Bureau of Conciliation and Mediation Services “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).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition 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). 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. Here, the Maney and Peltier affidavits establish the Division’s current standard mailing procedure. In this case, however, the Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notices. Specifically, a properly completed CMR is missing from the record (*see Matter of*

Rakusin, Tax Appeals Tribunal, July 26, 2001). Exhibit “A” of the Maney affidavit contains three pages of what purports to be a longer multi-page computer-generated CMR. Unlike in the procedure described in the Maney affidavit, the three pages in exhibit “A” are not physically connected, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 316 has been changed to April 2, 2013, but remains unchanged on page 179. Pages 1 and 316, therefore, bear a different date than page 179. As a result, the partial CMR submitted as exhibit “A” of the Maney affidavit also does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

F. These flaws may be overcome, however, 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 with respect to Notice of Determination number L-039186510 bearing certified control number 7104 1002 9730 1528 3975. Specifically, the Corina affidavit and the accompanying USPS delivery information clearly and convincingly shows that a copy of this notice, addressed to petitioner, which was also listed on the CMR, was delivered to petitioner at his Fresh Meadows, New York, address on April 6, 2013. The signature provided by the USPS indicates that petitioner signed for the document as recipient, and petitioner has offered no evidence to the contrary. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that notice number L-039186510 was delivered to petitioner’s last known address, as claimed, on April 6, 2013 (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner’s Garage, Inc.*, Tax Appeals Tribunal, June 10, 2010).

G. Based on the above conclusions, the 90-day period for filing a petition or request for conciliation conference with regard to notice number L-039186510 is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., April 6, 2013, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *revg* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Petitioner's request for conciliation conference was not filed until September 26, 2013. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). As a matter of law, Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest for notice number L-039186510 (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006; *Matter of Sak Smoke Shop*).

H. The same does not hold true, however, for Notice of Determination number L-039186567 bearing certified control number 7104 1002 9730 1528 3982. For this notice, the Division has not provided the necessary additional evidence of mailing. Specifically, the Corina affidavit and the accompanying USPS delivery information do not show that a copy of notice number L-039186567 was delivered to petitioner at his Fresh Meadows, New York, address. Rather, the USPS delivery information shows that this notice was delivered to an address in Kew Gardens, New York, on May 15, 2013. The signature provided by the USPS does not indicate that petitioner signed for the document as recipient. Instead, it shows the signature of recipient

as “Received Department of Taxation and Finance” and the address of recipient as “Queens District Office.” Thus, the Division has failed to introduce adequate proof that notice number L-039186567 was delivered to petitioner’s last known address and the Division’s motion with regard to this notice is denied.

I. The Division of Taxation’s motion for summary determination is granted and the petition is denied with respect to Notice of Determination number L-039186510, as indicated in Conclusion of Law G, and the Division’s motion for summary determination is denied with respect to Notice of Determination number L-039186567, as indicated in Conclusion of Law H, without prejudice to renewal.

DATED: Albany, New York
July 10, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE