

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KAHALA RESTAURANTS, LLC : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 826176
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2010 through February 29, 2012. :

Petitioner, Kahala Restaurants, LLC, 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 March 1, 2010 through February 29, 2012.¹

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), brought a motion dated July 24, 2014 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)(i) and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioner, appearing by Richard A. Wright, CPA, did not file a response. Accordingly, the 90-day period for the issuance of this determination commenced on August 25, 2014, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, Administrative Law Judge, renders the following order.

¹While the Petition, the Division of Taxation's Answer and subsequent motion papers all reference the period commencing on December 1, 2009, the Notice under protest and the subject of this order is for the period commencing March 1, 2010.

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 a Notice of Determination dated August 22, 2013. The notice is addressed to petitioner and bears assessment identification number L-040012139.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the Notice of Determination.

3. On December 27, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order, bearing CMS number 260039, determined that petitioner's protest of the Notice of Determination dated August 22, 2013 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 notice was issued on August 22, 2013, but the request was not mailed until November 21, 2013, or 91 days, the request is late filed.

4. On March 17, 2014, petitioner timely challenged the Conciliation Order Dismissing Request by filing a petition with the Division of Tax Appeals by certified mail. The petition states:

The Request for Conciliation Conference was timely filed on November 20th 2013. (See Certified Mail Receipt Attached). We request a restatement and acceptance of our Request based on the timely filed request.

Attached to the petition is a copy of a United State Postal Service Certified Mail Receipt (PS Form 3800) for mailing of a piece of mail certified mail return receipt requested. The certified mail receipt is postmarked November 20, 2013 by Arizona Flooring, CPU, Tempe, Arizona

85283.² The receipt indicates the article was addressed to “NYS Tax finance BCMS, WA Harriman Campus Bldg 9, Albany NY 12227.” Also attached is a copy of the corresponding return receipt (PS Form 3811) stamped December 11, 2013 indicating when delivery was effectuated.

5. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated July 10, 2014, of Daniel A. Maney, Manager of the Division’s Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) an affidavit, dated July 10, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked August 22, 2013.

6. The affidavit of Daniel A. Maney, Manager of the Division’s Refunds, Deposits, Overpayments and Control Units 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. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division’s general practice, the actual date of mailing is handwritten on the first page of the CMR, in the

²Pursuant to State Administrative Procedure Act § 306(4) official notice is taken that Arizona Flooring, CPU, Tempe, Arizona 85288 is a Contract Postal Unit in Tempe, Arizona. A Contract Postal Unit (CPU) is a supplier-owned or supplier-leased site operated by the supplier, under contract to the Postal Service to provide postal products and services to the public at U.S. Postal Service prices (*see* www.USPS.com).

present case “8/22/13.”³ It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, 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 “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.”

8. The CMR relevant to the Notice of Determination under protest consists of 19 pages and lists 205 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated August 22, 2013 to each page of the CMR and also wrote his or her initials on each page thereof.

9. Page 19 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0052 5561 and assessment number L-040012139, was mailed to

³In his affidavit, Mr. Maney states that “[i]n the upper right hand corner of Page 1 of the certified mail record, the date the notices were mailed was handwritten by personnel in the Department’s Mail Processing Center.” In fact, the handwritten date of mailing appears in the upper left corner on the pages attached to the Maney affidavit.

petitioner at the Scottsdale, Arizona, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. Page 19 of the CMR also indicates that a Notice of Determination with certified control number 7104 1002 9730 0052 5592 and assessment ID number L-040012139 was sent to "Richard A. Wright, 14301 N 87th Street, STE 216, Scottsdale, AZ 85260." An enclosure with the notice states that a copy of the notice was forwarded to Mr. Wright because the Division's records indicate that a power of attorney is on file for the tax matters at issue in the notice.

11. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The 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. That staff member then weighs, seals and places 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 signature or initials on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contains such postmarks and initials. 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 last page of the CMR. Here, the USPS employee complied with this request by both writing and

circling the number “205” on the last page next to the heading “Total Pieces Received at Post Office.”

12. According to the Peltier affidavit, a copy of the subject Notice of Determination was mailed to petitioner and to its representative on August 22, 2013, as claimed.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9(a)(i) of the Tax Appeals Tribunal’s 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 timely filed, 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.

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 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 [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*). In order to decide whether any such issues of fact exist, a discussion of the relevant law is necessary.

D. 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 the date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination 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 merits of the protest (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing 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). To prove the fact and the date of mailing of the subject 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 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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *Matter of Katz*).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on August 22, 2013. The CMR has been properly completed and therefore constitutes 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 CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

G. Notwithstanding that the Division has proven that the notice was issued on August 22, 2013, the certified mail receipt attached to the petition in this matter clearly shows a postmark date of November 20, 2013. In such a case, the postmark date on the certified mail receipt is deemed the date of filing (20 NYCRR 4000.7[a][3][ii]; *Hendley v. Commissioner*, 80 TCM 672 [the date of postmark affixed by a Contract Postal Unit was deemed the date of filing]). Since

November 20, 2013 is within 90 days of issuance of the notice of determination, the request for conciliation conference was timely filed.⁴

H. The Division's motion for summary determination is denied and a hearing on the merits will be scheduled in due course.

DATED: Albany, New York
October 23, 2014

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

⁴Notably absent from the record is the envelope in which the request for conciliation conference was mailed. Regardless, however, the postmark date on the certified mail receipt controls.