

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : ORDER
WILLIE EVANS D/B/A/ EVANS SNACKS : DTA NO. 827111
for Review of a Denial, Suspension, Cancellation or :
Revocation of a License, Permit or Registration under :
Articles 28 and 29 of the Tax Law. :

Petitioner, Willie Evans d/b/a Evans Snacks, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 28 and 29 of the Tax Law.

On June 10, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). Accompanying the motion was the affirmation of Stephanie M. Scalzo, dated June 8, 2016, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion. The 90-day period for issuance of this determination commenced on July 11, 2016 (20 NYCRR 3000.5[b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, and all pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for conciliation conference after receipt of a notice of proposed revocation of sales tax certificate of authority.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner a Notice of Proposed Revocation of Sales Tax Certificate of Authority, dated May 15, 2015. The notice was issued pursuant to Tax Law § 1134(a)(4)(A) and addressed to petitioner at “Willie E Evans, Evans Snacks, 2375 Southern Blvd Apt 7a, Bronx, NY 10460-1050.”

2. Petitioner protested the notice by filing a Request for Conciliation Conference, dated June 15, 2015, with the Division’s Bureau of Conciliation and Mediation Services (BCMS). The request was submitted on behalf of petitioner by Lisa Geyer, a tax specialist with Larson Financial of Westminster, Colorado.¹ The mailing envelope in which the request was enclosed bore a Pitney Bowes machine-metered postage stamp with the date reading June 15, 2015. The metered stamp also indicated that the envelope was mailed from zip code 80021, which includes Westminster, Colorado. The envelope did not bear a U.S. Postal Service (USPS) postmark.

3. Petitioner’s request for conference was stamped as received by BCMS on June 22, 2015.

4. By Conciliation Order dated July 10, 2015, petitioner’s request was dismissed as untimely, stating:

“The Tax Law requires that a request be filed within thirty days from the date of the statutory notice. Since the notice was issued on May 15, 2015, but the request was not mailed until June 17, 2015, or in excess of thirty days, the request is late filed.”

The only evidence in the record of a June 17, 2015 mailing date is contained in a printout from the USPS web site that is entitled “USPS Tracking” and was attached to the Division’s motion.

¹ Ms. Geyer submitted her power of attorney permitting her to file the request for conference on petitioner’s behalf. Ms. Geyer did not qualify as a representative for petitioner in this proceeding before the Division of Tax Appeals under 20 NYCRR 3000.2(a)(2) or (4), however.

The printout's first entry reads, "June 17, 2015, 9:01 p.m. Arrived at USPS Facility DENVER, CO 80266." Neither the printout's foundation nor its entries are further described.

5. Petitioner challenged the Conciliation Order by filing a petition with the Division of Tax Appeals. The petition is dated July 23, 2015 and was stamped as received by the Division of Tax Appeals on July 28, 2015.² The petition alleges that the request for conference was timely filed as it was postmarked and mailed June 15, 2015 and the 30-day deadline for its filing (i.e., June 14, 2015) fell on a Sunday. The petition also notes that a "supervisor at the state" instructed "that the request would be timely if mailed that day (i.e. June 15, 2015)" and, according to the petition, it was so mailed.

6. In order to establish proper mailing of the statutory notice on May 15, 2015, the Division provided the following: (i) an affirmation, dated June 8, 2016 of Stephanie M. Scalzo, Esq.; (ii) an affidavit, dated May 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated May 24, 2016, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (iv) the two-page certified mail record entitled "Certified Record for - TC - 344 -Not of Prop Revoc of ST COA" (CMR); (v) a copy of the Notice of Proposed Revocation of Sales Tax Certificate of Authority, dated May 15, 2015, together with its associated mailing cover sheet; (vi) a one-page document entitled "USPS Tracking" for Tracking Number 70131090000169594146; (vii) a copy of petitioner's ST-100 New York State and Local Quarterly Sales and Use Tax return for the period June 1, 2014 through August 31, 2014, dated

² The petition was also signed by Lisa Geyer as power of attorney for petitioner. As noted previously, she has not qualified to represent petitioner in this matter. It is undisputed that the petition was timely filed, however.

September 22, 2014 and filed with the Division on September 30, 2014; and (viii) petitioner's application to register for a sales tax certificate of authority, dated January 23, 2014.

7. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing notices of proposed revocation of sales tax certificate of authority. Ms. Nagengast 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. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "5/15/15." 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 USPS and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Ms. Nagengast. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

8. 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, known as Form TC - 344, 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."

9. The CMR relevant to the subject notice consists of 2 pages and lists 15 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast

notes that portions of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated May 15, 2015 to both pages of the CMR and also wrote his or her initials on each page thereof.

10. The first page of the CMR here indicates that a notice of proposed revocation of sales tax certificate of authority, assigned certified control number 7104 1002 9735 2406 4898 and reference number 150571924018 00, was mailed to petitioner at the Southern Boulevard, Bronx, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number, reference number and petitioner's name and address as noted.

11. Page two of the CMR here indicates that a copy of the notice of proposed revocation of sales tax certificate of authority, assigned certified control number 7104 1002 9735 2406 5000 and reference number 150571924018 01, was mailed to petitioner's then-representative, Sandy Tinoco, at "520 Zang Street, STE 212, Broomfield, CO. 80004." The corresponding mailing cover sheet bears this certified control number, reference number, petitioner's name, and Ms. Tinoco's name and Broomfield, Colorado address.³

12. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Room (Mail Room), describes the Mail Room's general operations and procedures. The Mail Room receives the notices and places them in an "Outgoing Certified Mail" area. 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. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted

³ Ms. Tinoco's name did not appear on the subsequent power of attorney submitted with petitioner's request for conference.

and the names and certified control numbers verified against 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. As noted, each page of the CMR contains such postmarks and initials in this case. 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 last page of the CMR. Here, the USPS employee complied with this request by handwriting and circling the number "15" on the last page next to his or her initials.

13. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of the notice of proposed revocation was mailed to petitioner and Ms. Tinoco on May 15, 2015.

14. The record contains a copy of petitioner's ST-100 New York State and Local Quarterly Sales and Use Tax Return for the period June 1, 2014 through August 31, 2014, dated September 22, 2014 and filed with the Division on September 30, 2014. On this return, petitioner listed his address as "341 9th Street, New York, NY 10099." The copy of the accompanying envelope has a return address that is partially obscured, but the visible portion reads "75 Southern Blvd. 7a, Bronx, NY 10460." According to Ms. Scalzo's affirmation, this is the last return filed by petitioner with the Division prior to the issuance of the subject notice.

15. Also attached to Ms. Scalzo's affirmation is a copy of petitioner's application to register for a sales tax certificate of authority, dated January 23, 2014. This application lists the physical address of petitioner's business as "341 9th Avenue Ground FL, New York, NY 10199," and business mailing address as "2375 Southern Blvd. 7a, Bronx, NY 10460." According to Ms. Scalzo's affirmation, this is the last application filed by petitioner with the Division prior to the issuance of the subject notice.

16. As noted in Finding of Fact 4, a one-page document entitled “USPS Tracking” for Tracking Number 70131090000169594146 was included with the Division’s motion. The document’s first entry indicates that on June 17, 2015 at 9:01 p.m., an item of certified mail with the aforementioned tracking number arrived at a USPS Facility in Denver, Colorado. The document tracks the delivery of the item, concluding with a delivery on June 22, 2015 at 9:37 a.m. in Troy, New York. Additionally, according to the document, an attempt at delivery in Albany, New York, was made on June 21, 2015 at 7:42 a.m., but that the recipient business was closed. June 21, 2015 was a Sunday. The Division did not present a foundational affidavit for the document.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of proposed revocation of sales tax certificate of authority by filing a petition for a hearing with the Division of Tax Appeals or request for conciliation conference with BCMS within 30 days from the date of mailing of such notice (*see* Tax Law §§ 2008[2][a]; 170[3-a][a]).

B. The Division has filed a motion for an order dismissing the petition, or in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). In the instant case, there is no dispute that the petition to the Division of Tax Appeals was timely filed. As a result, the Division of Tax Appeals has jurisdiction to hear this matter and only the motion for summary determination will be addressed. Given the timely petition, the Division’s motion to dismiss is improperly brought.

C. 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]). 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. Village of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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* at 562).

D. Where the timeliness of a request for conference is at issue, such as here, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged 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 it 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 the 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, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. 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 (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Proposed Revocation at issue was mailed by certified mail addressed to petitioner on May 15, 2015, establishing that the general mailing procedures described in the affidavits were followed. Petitioner’s name and address, as well as the numerical information on the notice, appeared on and corresponded to such information as set forth on the CMR, each page of which bore a USPS date stamp of May 15, 2015 and the initials of the USPS employee. There were 15 certified mail control numbers listed on the CMR for May 15, 2015, and the USPS employee who initialed the CMR indicated, by writing and circling the number “15” near such initials, that 15 items were received for mailing. The CMR has thus 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; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

F. Tax Law § 1147(a)(1) requires that notices such as the one at issue here be mailed to the person for whom it is intended at the address listed in the last return filed by him under Article 28 “or in any application made by him” In this case, the notice was addressed to petitioner at the address provided by him on his application to register for a sales tax certificate of authority dated January 23, 2014. The same address was also used by petitioner on the request for conference and the petition herein. Moreover, petitioner does not dispute receipt of the notice. Thus, it is concluded that the “last known address” used by the Division in mailing the statutory notice was proper.

G. As the statutory notice was properly issued on May 15, 2015, petitioner bears the burden of proving that a request for conference was filed within 30 days thereof. Here, the 30th day, June 14, 2015, fell on a Sunday; therefore, the deadline became Monday, June 15, 2015 (*see* 20 NYCRR 4000.7[b]). The crux of this matter is whether petitioner’s filing of his request for conference, the date of which is indicated by a metered postmark, meets this deadline.

H. Petitioner’s request for conference was dated as signed on June 15, 2015, and was purportedly mailed on the same date, as described in his petition. However, the envelope in which the request for conference was mailed does not bear any USPS postmark. Instead, the only postmark on the envelope is the Pitney Bowes machine metered postmark dated June 15, 2015. Under these circumstances, in order for a request for conference to be timely filed, 20 NYCRR 4000.7(b)(1) provides, as follows:

“If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e., metered mail):

(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for service or filing of the document;

(ii) the document must be received by [BCMS] not later than the time when an envelope or other appropriate wrapper which has sufficient postage prepaid and is properly addressed, mailed and sent by the same class of mail would ordinarily be received at the address designated by the [Division] if it were postmarked at the same point of origin by the United States Postal Service on the last day of such prescribed period or on the prescribed date for service or filing.”

In *Matter of Harron’s Electric Service, Inc.* (Tax Appeals Tribunal, February 19, 1988), the Tribunal, citing subdivision 2 of section 2103 of the Civil Practice Law and Rules, stated that “[f]ive days is, in our opinion, not later than the date a document would ordinarily be received when mailed through the United States Postal Service.” Here, the request for conference was stamped as received by BCMS on June 22, 2015 and not June 20, 2015, which would have been the fifth day after a June 15, 2015 mailing. June 20, 2015 was a Saturday, however. Therefore, Monday, June 22, 2015, would be the fifth day for ordinary delivery pursuant to 20 NYCRR 4000.7(b), and petitioner has presented evidence of timely mailing.

On the other hand, the Division has presented a USPS printout suggesting a June 17, 2015 mailing date. This document presents several concerns, though, as no foundation has been laid for it and its entries are unexplained. At best, it raises an issue of material fact with regard to the date of mailing that must be addressed in a hearing (*see Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997). Consequently, based on the record, summary determination in the Division’s favor is inappropriate.

I. The Division's motion for summary determination is denied and the matter will be scheduled for hearing in due course.

DATED: Albany, New York
October 6, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE