

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VIOLY C. McCAUSLAND	:	ORDER
	:	DTA NO. 827200
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 December 1, 2005	:	
through November 30, 2011.	:	

Petitioner, Violy C. McCausland, 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 December 1, 2006 through November 30, 2011.

On March 14, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Jennifer Hink-Brennan, 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 3000.9(b). Accompanying the motion was the affidavit of Jennifer Hink-Brennan, dated March 14, 2016, and annexed exhibits supporting the motion. On April 13, 2016, petitioner, appearing by Withers Bergman LLP (Shira Peleg, Esq., of counsel), filed an affidavit in opposition to the motion, dated April 13, 2016, with annexed exhibits. The 90-day period for issuance of this determination commenced on April 14, 2016 (20 NYCRR 3000.5[b]). After due consideration of the motion papers, attached affidavits and annexed exhibits, petitioner's response in opposition, and all pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for conciliation conference.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to Violy C. McCausland (petitioner), as a person responsible for the collection and payment of tax on behalf of VMS Associates, Inc., a Notice of Determination, dated February 20, 2015, asserting additional sales tax due in the sum of \$212,349.43 plus interest. The notice bore assessment number L-042519851-7.

2. Petitioner protested the notice by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated May 21, 2015. The mailing envelope in which the request was enclosed bore a machine-metered postage stamp with an illegible date. The postal meter was manufactured by Hasler, Inc. It is not apparent if the legibility was affected by the quality of the Division's photocopy or if the meter stamp was illegible *ab initio*. The envelope and its contents were stamped received by BCMS on May 26, 2015.

3. By Dismissal Order dated June 12, 2015, petitioner's request was dismissed as not timely filed, stating:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on February 20, 2015, but the request was not mailed until May 22, 2015, or in excess of 90 days, the request is late filed.”

The only evidence of a May 22, 2015 mailing date was a printout from the USPS web site that is known as USPS Tracking. Although attached to the Division's motion, its source is not mentioned.

4. Petitioner challenged the Dismissal Order by filing a petition with the Division of Tax

Appeals. The petition, sent by Federal Express, is dated September 9, 2015 and was stamped received by the Division of Tax Appeals on September 10, 2015. The petition alleges that the request for conference was filed timely, i.e., by May 21, 2015, but notes that the certified mail receipt could not be located. The petition also notes that an employee of petitioner's representative delivered the envelope containing the request to the Postal Service and received a receipt therefor. On November 12, 2015, the Division timely filed its answer to the petition. Because the petition to the Division of Tax Appeals was timely, the Division of Tax Appeals has jurisdiction to hear this matter. Therefore, only the motion for summary determination will be entertained herein.

5. To show proof of proper mailing of the notice of determination on February 20, 2015, the Division provided the following: (i) an affidavit, dated March 14, 2016 of Jennifer L. Hink-Brennan, Esq.; (ii) an affidavit, dated March 8, 2016, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (iii) an affidavit, dated February 29, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iv) an affidavit, dated March 2, 2016, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (v) the 23-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (vi) a copy of the Notice of Determination dated February 20, 2015 together with its associated mailing cover sheets; (vii) the United States Postal Service (USPS) PS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the response thereto; (viii) a copy of petitioner's e-MPIRE address summary, which indicates petitioner's address, updated as of August 8, 2014.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent

issuance of notices of deficiency, notices of estimated determination, notices of determination such as the notice of determination at issue herein, and other such notices during the period here in question, involved the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commenced with the CARTS computer-generation of a CMR and corresponding notices. The notices were predated with the anticipated date of their mailing, and each notice was assigned a certified control number. The certified control number for each notice appeared on a separate one-page "Mailing Cover Sheet" generated for each such notice, and that sheet bore a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generated any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, was a discrete unit with the batch of notices. The Mailing Cover Sheet was the first sheet in the unit.

7. The CARTS-generated CMR for each batch of notices listed each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appeared under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers were listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings listed appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices were forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appeared at the upper right corner of each page of the CMR. All pages were banded together when the

documents were delivered to the mail room and remain banded when the postmarked documents were returned to the Division after mailing, unless ordered otherwise.

8. Each statutory notice was predated with the anticipated date of its mailing. In contrast, each page of the CMR listed an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically set forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," was to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division's standard mailing procedures, statutory notices that were ready for mailing were received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch was preceded by its mailing cover sheet and was accompanied by any required enclosures, and each batch included its accompanying CMR. A member of the mail room staff, in turn, operated a machine that put each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet showed through the window. The staff member then weighed, sealed and affixed postage and fee amounts on the envelopes. A mail processing clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performed a random review of up to 30 pieces of certified mail listed on the CMR by

checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivered the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee was instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR was the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR was picked up at the post office by a staff member on the following day after its initial delivery and was delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on February 20, 2015, including the notice addressed to petitioner, consisted of 23 pages. Each of these pages included in its upper left corner the preprinted year/day/time "run" listing of "20150431700." Appearing in the upper right corner of the CMR on pages 1 and 23 was the handwritten date "2/20/15," indicating the manually inserted date of actual mailing. Each of the 23 pages included a stamped date of February 20, 2015, presumably made by the Postal Service. The CMR listed 247 pieces of mail, with 4 pieces withdrawn prior to mailing, resulting in 243 pieces actually received.

11. In this instance, on page 3, certified control number 7104 1002 9730 0402 8839 was assigned to assessment number L-042519851, addressed to Violy C. McCausland, c/o Shira Peleg, 430 Park Avenue, FL 10, New York, NY 10022-3528.

12. Appearing at the bottom of page 23 of the CMR was the preprinted heading "Total Pieces and Amounts," to the right of which appeared preprinted columns headed "Pieces," "Postage," and "Fees." These columns reflected the preprinted number of pieces of mail for this

CMR, here 247, as well as postage and fee amounts for such pieces of mail. Immediately below this heading was the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “243” was handwritten and circled. Appearing at the lower right area of page 23 was a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above this stamped instruction reflected the aforementioned USPS date as well as initials presumably affixed by the postal clerk.

13. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and supervisor in the Division’s mail room. Each affiant attested to their personal involvement in and familiarity with past and present practices and procedures concerning, the preparation and generation of notices such as those at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. The record included a copy of the Notice of Determination allegedly mailed by certified mail to petitioner on February 20, 2015. The record also included a copy of petitioner’s e-MPIRE address summary, which indicated petitioner’s address, updated as of August 8, 2014, as “c/o Shira Peleg, 430 Park Avenue, FL 10, New York, NY 10022-3528. The record included no other explanation of the document. However, the address listed was the same address used by petitioner on the request for conference, power of attorney, and the petition herein.

16. The affidavit of Heidi Corina, a legal assistant in the Division’s office of counsel, detailed her preparation and filing of a USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with respect to the Notice of Determination at issue. In response, the USPS confirmed delivery to petitioner of the certified mail in question at the

specified address on February 24, 2015 at 11:53 a.m., and included a scanned signature and printed name of the recipient.

17. In opposition to the motion, petitioner asserted that the request was mailed on May 21, 2015, by certified mail, to the proper address. It conceded that it lost the certified mail receipt but submitted the affidavit of Brandin D. Graham, the employee of Withers Bergman LLP who physically mailed the request and received the dated receipt.

Petitioner objected to the Division's reliance on tracking information taken off the USPS web site as a basis for its assertion that the petition was mailed on May 22, 2015. Petitioner points out that such printouts are inaccurate in various details, such as the post office in which the piece of mail was delivered by hand or the time of mailing. To underscore its argument, petitioner submitted certified mail receipts and corresponding tracking information for mail posted between March 2, 2015 and March 17, 2015 by Withers Bergman LLP. Petitioner noted that 44 of the 49 mailings indicated material differences between the receipts and the tracking information. In addition, petitioner argued that the request was never marked accepted from the customer and therefore does not demonstrate that the request was mailed. The only pertinent entry states that the request "arrived" on May 22, 2015 at a different postal facility than that where Mr. Graham delivered the request the day before.

CONCLUSIONS OF LAW

A. 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 protest a notice of determination by filing a request with the BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). In this case, petitioner chose the latter path.

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]). 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). As detailed hereafter, there exist

no material and triable issues of fact, and the Division is entitled to summary determination in its favor.

C. Where the timeliness of a request is at issue, 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*).

D. 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 Determination at issue was mailed by certified mail addressed to petitioner on February 20, 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 notices, appeared on and corresponded to such information as set forth on the CMR, each page of which bore a USPS date stamp of February 20, 2015 and the initials of the USPS employee. There were 247 (four ultimately withdrawn) certified mail control numbers listed on the CMR for February 20, 2015, and the USPS employee who initialed the CMR indicated, by writing and circling the number "243" near such initials, that 243 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).

E. The notice was addressed to petitioner at the address provided by him or his representative as reflected on the e-MPIRE address summary which indicated petitioner's last known address, updated as of August 8, 2014. The same address was used by petitioner on the request for BCMS conference, the power of attorney and the petition herein. Thus, this "last known address" used by the Division in mailing the notice in issue was proper.

F. Having determined that the notice was properly issued on February 20, 2015, petitioner bears the burden of proving that a request for conference was filed within 90 days thereof, or, May 21, 2015.

The proof offered by petitioner, the affidavit of Mr. Graham and the documentation of discrepancies between the certified mail receipts and USPS tracking information printouts is not

dispositive of the issue. Neither prove that the request for conference was actually filed on May 21, 2015. However, the envelope containing the request, submitted by the Division with its motion papers, raises a material and triable issue of fact.

The envelope is properly addressed and indicates that it was received by BCMS on May 26, 2015. It indicates that the envelope was mailed by certified mail and that postage of \$7.40 was paid. The postage was affixed by means of a meter mail machine manufactured by Hasler, Inc., but, for the most part, the remaining print on the meter stamp is illegible. This fact is fatal to the Division's motion.

The Division's regulations state that if the postmark on an envelope is made by other than the USPS (metered mail), then the date on such postmark must fall on or before the prescribed date for filing, and the document must be received not later than the time when an envelope with sufficient postage, properly addressed and sent by the same class of mail would ordinarily be received by the Division. (20 NYCRR 2399.2[b][1].)

In this matter, May 21, 2015 fell on a Thursday and May 22, 2015 on a Friday. Monday, May 25, 2015 was a federal holiday, Memorial Day, on which there was no mail delivery. Thus, an envelope mailed by certified mail on either May 21 or 22, 2015 would have arrived on the same day, May 26, 2015, satisfying one of the regulatory requirements (20 NYCRR 2399.2[b][1][ii]). Therefore, the focus becomes the date on the metered postmark. Since the copy submitted by the Division is illegible, it is not dispositive and other proof may be offered if the original is illegible as well. The Division's reliance on the USPS printout for the May 22, 2015 mailing date is not availing, since no foundation has been laid for its introduction and it raises numerous questions concerning postal operations that have not been resolved. (*See Matter*

of McNamara, Tax Appeals Tribunal, January 30, 1997 [where confusion raised by a metered postmark affixed by the Division and overall poor photocopy raised issues on mailing that served to defeat the Division's motion for summary determination].)

The burden is on petitioner to submit adequate evidence to prove that the postmark was timely (*Matter of Yu*, Tax Appeals Tribunal, January 9, 1992) and a full hearing on this matter is required.

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

DATED: Albany, New York
July 07, 2016

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE