

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GREGG M. REUBEN : ORDER
 : DTA NO. 827466
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Periods June 1, 2013 through August 31, 2013 :
and December 1, 2013 through May 31, 2014. :
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Petitioner, Gregg M. Reuben, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 2013 through August 31, 2013 and December 1, 2013 through May 31, 2014.

On June 27, 2016, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Linda A. Jordan, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of Linda A. Jordan, Esq., dated June 24, 2016, and annexed exhibits supporting the motion. On July 13, 2016, petitioner, appearing by Ballou Stoll Bader & Nadler, P.C. (Norman Berkowitz, Esq., of counsel) filed a letter brief in opposition to the motion of the Division of Taxation. The 90-day period for issuance of this order commenced on July 27, 2016 (Tax Law § 3000.5[b]). After due consideration of the motion papers, attached affidavit and annexed exhibits, petitioner's response in opposition, and all pleadings and proceedings had herein, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely protest following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Gregg M. Reuben, a Notice of Determination, L-042249602-1, dated December 2, 2014, assessing sales and use taxes due in the amount of \$3,308.57, plus penalty and interest, for the period June 1, 2013 through August 31, 2013. The notice is addressed to “REUBEN-GREGG M 555 W 59TH ST APT 31D NEW YORK NY 10019-1247.” The mailing cover sheet of this notice contains the certified control number 7104 1002 9730 0330 4408. This notice was issued to petitioner because he was determined to be an officer or responsible person of WH PARKING MGMT. LLC.

2. Petitioner’s representative, Norman R. Berkowitz, Esq., filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination L-042249602, L-041978311, L-041978312 and L-041978313. Mr. Berkowitz hand-dated and signed the Request on December 9, 2015. The reasons given on the Request for protesting the four listed notices included, among others, that the notices were not received by the taxpayer, and that the notices were not mailed in accordance with Tax Law § 1147. Attached to the Request was a “Consolidated Statement of Tax Liabilities” (Form DTF-967) dated October 6, 2015, issued to petitioner, that listed a number of statutory notices including the four notices being protested by the Request. On this Request, petitioner’s address is listed as 555 West 59th Street, Apt. 31-D, New York, NY 10019. The envelope in which the Request was sent by United States Postal Service (USPS) Certified Mail bore illegible postmarks. BCMS received the Request on December 14, 2015.

3. On December 31, 2015, BCMS issued a Conciliation Order Dismissing Request (Dismissal Order) to petitioner. Bearing CMS No. 268839 and referencing notice numbers L-041978311, L-041978312, L-041978313 and L-042249602, the Dismissal Order determined that petitioner's protest was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on October 3, 2014 and December 2, 2014, but the request was not received until December 14, 2015, or in excess of 90 days, the request is late filed.”

4. On February 1, 2016, the Division of Tax Appeals received a petition seeking revision of four notices of determination L-041978311, L-041978312, L-041978313 and L-042249602. The envelope in which the petition was sent by Certified Mail bears a USPS metered stamp dated January 27, 2016. There is no dispute that the petition was filed within 90 days after the December 31, 2015 issuance of the Dismissal Order, and constitutes a timely challenge thereto. Petitioner's petition lists his address as 555 West 59th Street, Apt. 31-D, New York, NY 10019. In this petition, it was asserted, among other things, that “[t]he appropriate and required Notices were not served on the Petitioner in accordance with Tax Law Section 1147 and are therefore invalid and void.”

5. In support of the motion and to prove proper and timely mailing of Notice of Determination L-042249602, the Division submitted the following: (i) an affidavit, dated June 24, 2016, of Linda A. Jordan, Esq., the Division's representative; (ii) an affidavit, dated May 20, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated December 2, 2014; (iv) an affidavit, dated May 24, 2016, of Bruce Peltier, stores and mail operations supervisor in the Division's mail room; (v)

a copy of Notice of Determination L-042249602, dated December 2, 2014, and the accompanying mailing cover sheet; (vi) a copy of petitioner's Request for Conciliation Conference, received by BCMS on December 14, 2015, with the accompanying cover letter from petitioner's representative; (vii) a copy of the Dismissal Order, dated December 31, 2015; (viii) a copy of petitioner's New York State Resident Income Tax Return for the year 2013, which was electronically filed on or about October 2, 2014; and (ix) a copy of the Division "e-MPIRE" printout related to petitioner.

6. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and 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 and last pages of the CMR in the present case to the actual mailing date of "12/2/14." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless otherwise ordered. 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

taxpayer 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 December 2, 2014 CMR relevant to Notice of Determination L-042249602 consists of 35 pages and lists 381 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 35, which contains seven entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee initialed or signed and affixed a postmark dated December 2, 2014 of the Colonie Center, New York, branch of the USPS to each page of the CMR and wrote and circled the number "381" on page 35 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE." Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 381.

9. Page two of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0330 4408 and reference number L-042249602, was mailed to "REUBEN-GREGG M," at 555 West 59th St., Apt 31D, New York, NY 10019-1247, i.e., the same address listed on the Notice of Determination. The corresponding mailing cover sheet, attached to the Nagengast affidavit as "Exhibit B," bears this certified control number and petitioner's name and address as noted above.

10. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999, describes the mail room's general operations and procedures. The mail room receives the notices

in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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 of mail 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 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. Here, as noted, the USPS employee affixed a postmark dated December 2, 2014 to each page of the CMR and initialed or signed on page 35. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by writing and circling the number “381” on the last page of the CMR.

11. Mr. Peltier’s affidavit states that the CMR is 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 Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to other departmental personnel for storage and retention.

12. According to both the Nagengast and Peltier affidavits, a copy of Notice of Determination L-042249602 was mailed to petitioner on December 2, 2014, as claimed.

13. The record includes a copy of Notice of Determination L-042249602 allegedly mailed

by certified mail to petitioner on December 2, 2014, as described. The record also includes petitioner's resident income tax return (Form IT-201) as electronically filed for the year 2013 (*see* Finding of Fact 5). This return was the last return filed by petitioner prior to the issuance of Notice of Determination L-042249602, and it lists petitioner's address as 555 West 59th Street, **Apt. No. 32 D**, New York, NY 10019 (emphasis added).

14. The record also includes a two-page e-MPIRE printout document, dated June 14, 2016 at "15:49:58," containing an "Individual Taxpayer Profile Inquiry" "Address Summary" for petitioner's taxpayer identification number, name, and "Address:" 555 West 59th St., Apt 32 D, New York, NY 10019-1248. This document is described as "the Division's e-MPIRE printout which shows Petitioner changed his physical and mailing address on October 27, 2014 to 555 W 59th St., Apt. 31D, New York, NY 10019-1247, via his Online Services Account" (*see* Jordan affidavit at 7). The record includes no other information or explanation concerning the document.

15. In opposition to the motion, petitioner asserts that the Division has not established proper issuance of Notice of Determination L-042249602, one of the four notices of determination under protest in his petition. Petitioner maintains that the proper address to which this Notice of Determination should have been issued would include **Apt No. 32 D**, as set forth on the last return filed by him prior to the issuance of Notice of Determination L-042249602, and would not include **Apt. 31D**, as set forth on this Notice of Determination as mailed. He states that the Division failed to explain the e-MPIRE printout document described above, and that there is no evidence that petitioner notified the Division of a change of address before the date of issuance of this Notice of Determination.

16. The Division submitted no proof of mailing with respect to the other three notices of

determination L-041978311, L-041978312 and L-041978313 that are protested in petitioner's petition.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29 of the Tax Law. A taxpayer may file a petition with the Division of Tax Appeals seeking a revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the Notice of Determination (*see* Tax Law §§ 1138[a][1]; 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).

B. In this case, petitioner chose to file a request for conciliation conference in protest of four notices of determination, rather than a petition, in the first instance. In turn, BCMS dismissed petitioner's Request as not timely filed. Petitioner thereafter challenged the BCMS Dismissal Order by filing a petition with the Division of Tax Appeals. There is no dispute that the petition was filed well within the 90-day statutory time limit for filing a petition following the issuance of a conciliation order (*see* Findings of Fact 3 and 4; Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]).

C. With respect to only Notice of Determination L-042249602, the Division has brought 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). Since, as noted, the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition, and the Division's motion to dismiss under section 3000.9(a) of the Rules is improperly brought. 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 a conciliation conference with respect to Notice of Determination L-042249602.

D. 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 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]).

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 determination 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 a material 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]).

E. Where, as here, 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 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 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*).

F. 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). 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 Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

G. 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, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13,

2012). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that Notice of Determination L-042249602 was mailed by certified mail addressed to petitioner on December 2, 2014. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to Notice of Determination L-042249602 issued to petitioner. Petitioner's name and address, as well as the numerical information of the Notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of December 2, 2014 and the initials of the USPS employee. There are 381 certified mail control numbers listed on the CMR for December 2, 2014, and the USPS employee who initialed the CMR indicated by writing and circling the number "381" next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE" that 381 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).

H. The only remaining issue on this motion is the question of whether Notice of Determination L-042249602 was addressed to petitioner at "his last known address" at the time it was mailed, so as to be considered "properly mailed." Petitioner asserts that the Division's use of "Apt. 31D," on the basis of a change of address evidenced herein only by an e-MPIRE printout document (*see* Finding of Fact 14), without any further evidence pertaining thereto, was improper and does not support using the allegedly changed address for purposes of properly mailing Notice of Determination L-042249602. Rather, petitioner maintains the evidence on this motion only supports the conclusion that petitioner's "last known address" was "Apt. No. 32 D," as appearing on the last return filed prior to the issuance of the Notice of Determination (*see* Finding of Fact

13).

I. Tax Law §§ 1138(a)(1) and 1147(a)(1) govern the issuance of a notice for the assessment of sales and use tax liability against an individual. Tax Law § 1138(a)(1) provides:

“A notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state After ninety days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing, or unless the commissioner of his own motion shall redetermine the same.”

Tax Law § 1147(a)(1) provides:

“Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of [article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.”

Since there is no evidence or argument of fault or flaw with the physical method and fact of mailing of Notice of Determination L-042249602, the sole issue remaining to be resolved on this motion is whether the Division’s use of Apt. 31D rather than Apt. No. 32D was proper.

J. As above, Tax Law § 1138(a)(1) calls for mailing to a person’s “last known address in or out of this state,” and Tax Law § 1147(a)(1) further calls for mailing to “the address given in the last return filed by him pursuant to the provision of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” Under these rules, the Division must, in the first instance, mail the notice to the last

known address provided by the person through his own filings or applications. With respect to this motion, the only evidence that petitioner advised the Division, through his own filings, applications or otherwise, that his personal address had changed from that set forth on his tax return filed most recently prior to the issuance of Notice of Determination L-042249602, is the Division's e-MPIRE printout document (*see* Finding of Fact 14). The record contains no evidence in explanation of the e-MPIRE printout document and any information contained therein, other than the vague description in the Jordan affidavit (*see* Findings of Fact 14). The e-MPIRE printout document, without additional evidence, is insufficient to support a conclusion that petitioner's address changed from "Apt. No. 32D," per his return, to "Apt 31D," as alleged by the Division. Under the foregoing circumstances, there are material facts in issue and the Division cannot be said to have proved mailing of Notice of Determination L-042249602 to petitioner's last known address (*Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Consequently, the subject motion may not be granted, and a hearing on the merits of the petition may not be denied on the basis of the Division's allegation that it established proper mailing of the Notice of Determination.¹

K. Absent proof of proper mailing, the 90-day period for filing either a Request or a petition is tolled until such time as petitioner actually received the notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992], *lv denied* 79 NY2d 759 [1992]), whereupon the time within which to file

¹ It is noted that Domestic Mail Manual 600 (Mailing Standards of the USPS), 602 (1.3) (Address Elements) and (1.4.2[e]) (Complete Address Elements) regards the inclusion of a secondary address unit designator (such as a street, apartment, unit or suite number, as applicable) as a required element of an address. From this, it follows that the use of an incorrect secondary address unit designator (e.g., an incorrect apartment number) is properly considered a consequential error for purposes of commencing the period within which a taxpayer must act to preserve the right to be heard on the merits (*see Matter of Combemale*).

a protest would have commenced, unless issuance of the notice was precluded as time-barred by operation of the period of limitations thereon (*see Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Since there is no evidence of when the notice may have been received, the petition is deemed to have been timely filed and the Division's motion for summary determination must be denied with respect to Notice of Determination L-042249602.

L. While the petition in this matter also protests notices of determination L-041978311, L-041978312 and L-041978313, it is noted that the Division did not submit any proof of mailing with respect to those notices (*see* Finding of Fact 16), and they were not the subject of the Division's motion for summary determination.

M. The Division's motion for summary determination is denied without prejudice. A hearing will be scheduled in due course for notices of determination L-042249602, L-041978311, L-041978312 and L-041978313.

DATED: Albany, New York
October 20, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE