

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MIGUEL URREGO :
 :
 :
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2011 through August 31, 2012. :

ORDER
DTA NO. 827558

Petitioner, Miguel Urrego, 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 period March 1, 2011 through August 31, 2012.

On May 4, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 14, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Petitioner, appearing by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA), submitted a response on July 21, 2016, which began the 90-day period for issuance of this order. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the petition should be dismissed because it was not timely filed following the issuance of notices of determination.

FINDINGS OF FACT

1. On March 25, 2016, petitioner, Manuel Urrego, filed a petition with the Division of Tax Appeals in protest of the following notices of estimated determination issued by the Division of Taxation (Division) pursuant to Articles 28 and 29 of the Tax Law:

Notice Number	Tax Period Ended	Tax	Penalty	Interest	Balance Due
L-041123666	8/31/12	\$9,662.19	\$2,898.61	\$2,670.64	\$15,231.44
L-041123667	5/31/12	\$34,649.76	\$10,741.27	\$11,231.51	\$56,622.54
L-041123668	2/29/12	\$55,739.52	\$17,279.14	\$20,796.00	\$93,814.66
L-041123669	11/30/11	\$101,425.71	\$31,441.82	\$43,029.68	\$175,897.21

The petition also protested the following notices of determination issued pursuant to Articles 28 and 29 of the Tax Law:

Notice Number	Tax Period Ended	Tax	Penalty	Interest	Balance Due
L-041123670	8/31/11	\$9,662.21	\$3,043.48	\$4,664.04	\$17,369.73
L-041123671	5/31/11	\$33,649.77	\$10,589.76	\$17,938.51	\$62,178.04

Each of the above notices was dated May 1, 2014. The Division maintains that the notices were issued electronically pursuant to Tax Law § 35.

2. The subject notices were issued to petitioner as a responsible person for a company named Chef & Company, LLC, for the periods at issue.

3. On May 4, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of notices of determination numbers L-041123666, L-041123667, L-041123668, L-041123669, L-041123670, and L-041123671, issued to petitioner on May 1, 2014 and that the petition was filed on March

25, 2016, or 694 days later. As a result, the Division of Tax Appeals intended to dismiss the petition.

4. In support of dismissal and to prove the issuance of the notices under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated July 13, 2016, of Adam Roberts, Esq.; (ii) an affidavit, dated July 12, 2016, of Monica Amell, Taxpayer Services Specialist 3 and Team Lead of the External Communication Unit of the Division; (iii) a copy of the Division's Online Services (OLS) Account Terms and Conditions for Individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email"; (v) a screenshot of petitioner's OLS "View Online Services Account"; (vi) correspondence dated September 20, 2011 from the Division to petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) the subject notices of estimated determination and notices of determination all dated May 1, 2014; (ix) a copy of petitioner's "Event Management Transaction Log" within the e-Manages Process for an Integrated Revenue Enterprise (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; (xi) the Division's printout of "Delivery Details by Template ID"; and (xii) the Division's printout of electronic message delivery status.

5. The affidavit of Monica Amell sets forth the Division's general practice and procedure for the processing and delivery of taxpayer specific electronic communications including electronic statutory notices. Ms. Amell has been Team Lead of the External Communication Unit of the Division since June 2013. As part of Ms. Amell's duties, she manages the processing and delivery of taxpayer specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. Taxpayers may open

an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to their chosen external email address advising the taxpayer to check their OLS account for any message in the Message Center section. The Message Center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the Manage Email section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer's creation of an OLS account.

6. Attached as an exhibit to Ms. Amell's affidavit is a copy of the Division's OLS Account Terms and Conditions for Individuals. According to Ms. Amell, this is the document wherein

“ the taxpayer authorizes electronic communication to receive tax-related documents and communications electronically and agrees and understands [the Division] will no longer use physical (postal) mail to provide these communications. It is further agreed that [the Division] will alert the taxpayer to sign on to the secure Online Services area of the website to access such information. It is further understood and agreed that it is the taxpayer's responsibility to log onto OLS to provide updates to email addresses and periodically check for new account activity”

The copy of the OLS Account Terms and Conditions for Individuals attached to Ms. Amell's affidavit reads “[u]pdated: July 16, 2015.” Ms. Amell does not state what updates occurred on that date or how previous versions of the terms and conditions agreement read.

7. The Division's Advanced Function Presentation (AFP) system initiates billing printouts. The AFP system uses the Division's DZ4010Z Retrieve View Data (RVD) program.

The RVD program verifies email eligibility based on the Internal Taxpayer ID, tax type and the billing form. The RVD program uses Internal Taxpayer ID, User ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

8. When a statutory notice is scheduled to be issued to a taxpayer under this procedure, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS Message Center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

9. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their Message Center upon logging in to the OLS. The statutory notice is viewable in the Message Center section of the taxpayer's OLS account.

10. Petitioner opened an OLS account with the Division on September 16, 2011 under his name, taxpayer identification number, and user identification number, using a Logon ID nickname of "Mu**ego8" and an email address of "miguel@***.com."¹ Petitioner's OLS account for this user identification number and email address remains active to date.

11. The record is devoid of a copy of the OLS Account Terms and Conditions for

¹ The email address is partially redacted herein for privacy purposes.

Individuals as it existed on September 16, 2011.

12. In the Manage Email section of petitioner's OLS account, petitioner indicated "yes" under "receive emails" in response to "Bills and Related Notices," "Get emails about your Bills" and "Other Notifications," and "Get emails about refunds, filings, payments, account adjustments, etc."

13. On September 20, 2011, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on September 16, 2011 under the username of "mu**ego8."

14. On May 1, 2014, the Division posted six messages stating, "You have a new liability due" to petitioner's OLS account and sent corresponding email alerts to petitioner's email address of miguel@***.com. The Division posted notices of estimated determination numbers L-041123666 through L-041123669 and notices of determination numbers L-041123670 and L-041123671 to petitioner's OLS account on May 1, 2014, which were stored in his OLS Message Center.

15. The Division maintains delivery status information of email alerts in the Delivery Details by Template ID (Delivery Details). The Delivery Details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address of miguel@***.com on May 1, 2014, with APL Tracking IDs MG050120149688486, MG050120149688498, MG050120149688501, MG050120149688502, MG050120149688504, and MG050120149688505. The Delivery Details indicate the status of the emails sent to petitioner on May 1, 2014 as "D" (delivered).

16. Attached to Ms. Amell's affidavit is a printout of the status of messages sent to

petitioner's OLS account and email address. As explained by Ms. Amell, the status information reports a status of "R" for read and "U" for unread. The status printout relevant to the May 1, 2014 messages sent to petitioner indicates that messages APL Tracking IDs MG050120149688486, MG050120149688498, MG050120149688501, MG050120149688502, MG050120149688504, and MG050120149688505 delivered to petitioner's OLS account and email address had a status of "U" or unread.

17. Ms. Amell avers that the procedures followed and described in her affidavit were the normal and regular procedures of the Division's External Communication Unit on May 1, 2014.

18. Petitioner, through his representative, filed an unsworn letter in response to the Notice of Intent to Dismiss Petition. Petitioner asserts that the subject notices were not mailed by certified mail and that he never agreed to receive such notices by electronic mail. Further, petitioner points out that the copy of the OLS Account Terms and Conditions for Individuals submitted by the Division in its response was not in effect on May 1, 2014, the date of the subject notices. Finally, petitioner maintains that the subject notices were improperly issued as he was a minority member of Chef and Company LLC.

CONCLUSIONS OF LAW

A. The standard of review for a notice of intent to dismiss petition is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Such a motion "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]).

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. With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a notice of determination (Tax Law §§ 1138, 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

D. Where the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax

Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. While Tax Law § 1138 requires the mailing of a notice of determination by certified or registered mail to the taxpayer’s last known address, Tax Law § 35 provides for an alternative method of issuing a notice by means of electronic communication. Specifically, Tax Law § 35 provides as follows:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”²

F. In this matter, the Division furnished the statutory notices to petitioner by use of electronic means of communication and not by certified mail. The Division has not sufficiently established, however, that it obtained petitioner’s authorization, as required by the statute as an OLS account holder, to furnish such notices electronically or to forego certified mail. In particular, the version of the OLS Account Terms and Conditions for Individuals attached as an exhibit to Ms. Amell’s affidavit was updated on July 16, 2015, or after the September 16, 2011

² There are two sections 35 of the Tax Law. The relevant section herein is section 35, Use of electronic means of communication. The other section 35 contains provisions for the Economic transformation and facility redevelopment program tax credit and is not relevant here.

creation of petitioner's OLS account and the May 1, 2014 date of the notices at issue. Crucially, Ms. Amell does not describe the nature of the July 2015 updates or how they affected the agreement. Moreover, Ms. Amell does not state that the copy of the OLS Account Terms and Conditions for Individuals attached to her affidavit is in the same form as existed when petitioner's account was open. Nowhere in the Division's submission is there a copy of the terms and conditions as agreed upon by petitioner in 2011 in establishment of his OLS Account. Based on the records of the relevant transaction provided by the Division, there remain issues as to the form and terms, if any, of petitioner's authorization for his OLS account in 2011, a fundamental requirement for electronic mailing of a statutory notice under Tax Law § 35. Consequently, as there are material and triable issues of fact, dismissal is unwarranted.

G. The Notice of Intent to Dismiss Petition issued to Manuel Urrego dated May 4, 2016 is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
October , 2016

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