

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GERD PLUS INC. : ORDER
for Revision of a Determination or for Refund of : DTA NO. 828201
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period Mach 21, 2013 through :
February 28, 2015. :
:

Petitioner, Gerd Plus Inc., 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 21, 2013 through February 28, 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel), brought a motion dated August 17, 2017, seeking an order dismissing the petition, or in the alternative, for summary determination in the above-referenced matter pursuant to Tax Law § 2006 (6) and sections 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, failed to respond to the Division of Taxation’s motion. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of determination number L-044601002.

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 April 8, 2016, and bearing assessment identification number L-044601002 (subject notice), which is addressed as follows:

“Gerd Plus Inc.
Edible Arrangements
492 Avenue M
Brooklyn, NY 11230-4612”

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject notice. The request was filed on April 25, 2017, when it was faxed to BCMS.

3. On May 12, 2017, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notice 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 April 8, 2016, but the request was not received until April 25, 2017, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order on May 24, 2017. The petition does not deny that petitioner received the subject notice, but rather states petitioner's belief that he timely protested the subject notice.

5. To show proof of proper mailing of the subject notice the Division provided, in addition to the affidavit of Melanie Spaulding, the following with its motion papers: (i) an affidavit, dated July 27, 2017, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 8, 2016; (iii) an affidavit, dated August 1, 2017, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the subject notice with the associated mailing cover sheet; (v) a copy of petitioner's request for conciliation conference, stamped as received by BCMS on April 25, 2017; and (vi) petitioner's 2011 New York resident income tax return, dated October 20, 2012, which lists the same address for petitioner as that listed on the subject notice, except that it omits "Edible Arrangements." The 2011 income tax return was the last return filed with the Division by petitioner before the subject notice was issued.

6. The affidavit of Deena Picard explains that she has been in her current position as Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. She has been a Data Processing Fiscal Systems Auditor 3 since 2006, prior to which she worked in the Division's Information Systems Management Bureau. As a result of the positions she has held with the Division, she 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 are predated with the anticipated date of mailing. 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, the Departmental return address on the front, and taxpayer assistance information on the back.

7. None of the affidavits submitted by the Division on this motion discuss how the CMR is generated, whether automatically by means of CARTS, or manually. Ms. Picard's affidavit, however, explains the following about the meaning of the various columns on the CMR:

“The [CMR] lists each statutory notice in the order the notices are generated in the batch. The certified control numbers appear on the [CMR] under the first heading, entitled CERTIFIED NO.” The assessment numbers are listed under the second heading, entitled “REFERENCE NO.” The names and addresses of the taxpayers are listed under the third heading, entitled “NAME OF ADDRESSEE, STREET AND PO ADDRESS.”

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, an employee in the Division's mail room hand-writes in the date the statutory notices are actually mailed on the first and last page of the CMR. In this case, the date of “4/8” is handwritten in on the first and last pages of the CMR. In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. 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.

8. The CMR in the present matter consists of 21 pages and lists 224 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 21, which contains 4 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated April 8, 2016 to each page of the

CMR, wrote and circled the number “224” on page 21 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 21.

9. Page 10 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0815 6514 and reference number L-044601002 was mailed to “GERD PLUS, INC.” at the Brooklyn, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as shown on the CMR, except for, as noted in Finding of Fact 1, the addition of “Edible Arrangements” into the address. Page 8 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0815 6347 and reference number L-044601002 was mailed to “MELVIN S. SCHREIBER, 21 HARBOR PARK DRIVE N, PORT WASHINGTON, NY 11050.”

10. The affidavit of Fred Ramundo explains that he has been a supervisor in the Division’s mail room since December 2013, and that, as a result of that experience, he is familiar with present and past office procedures relating to statutory notices. His affidavit describes the Division’s mail room’s general operations and procedures. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. A mailing cover sheet precedes each notice. A staff member receives 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 first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed 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. 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 CMR. Each page of the CMR in exhibit “A” of the Picard affidavit contains a USPS postmark of April 8, 2016. On page 21, corresponding to “Total Pieces and Amounts,” is the preprinted number 224 and next to “Total Pieces Received At Post Office” is the handwritten and circled entry “224.” There is a set of initials or a signature on page 21.

11. According to both the Picard and Ramundo affidavits, a copy of the subject notice was mailed to “Gerd Plus, Inc.” on April 8, 2016, as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings 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). As the petition in this matter was filed within 90 days of the conciliation order (*see* Findings of Fact 3 and 4), 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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [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]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists (*Kuehne & Nagel, Inc. v F.W. Baiden*, 36 N.Y.2d 539 [1975]).

D. Petitioner did not respond to the Division’s motion. Petitioner has thus presented no evidence to contest the facts alleged in the Picard and Ramundo affidavits; therefore, those facts “may be” deemed admitted (*Kuehne & Nagel, Inc. v F.W. Baiden*, at 544). Here, however, the assertion in the Division’s affidavits that the Division mailed a copy of the subject notice to petitioner is not deemed admitted because, as discussed below, it is contradicted by the Division’s own documentary evidence (*see Matter of William J. Jones*, Tax Appeals Tribunal, December 20, 2016 [even where petitioner submitted an inadequate response, the Division’s motion for summary determination must still be denied because the Division failed to establish its prima facie case]).

E. 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 date of mailing of such notice (Tax Law

§ 1138 [a]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the BCMS “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 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).

F. Where, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. Here, the Division has offered proof sufficient to establish its procedure for mailing notices of determination, through the affidavits of Ms. Picard and Mr. Ramundo. Whether the Division has met its burden of showing that it followed that procedure is a harder question, which requires further analysis. The name on the notice of determination issued to petitioner is

“Gerd Plus Inc., with “Edible Arrangements” written directly underneath (*see* Finding of Fact 1). The third column in the CMR, however, entitled “NAME OF ADDRESSEE, STREET AND PO ADDRESS” shows petitioner’s name and address without “Edible Arrangements,” i.e., only as “Gerd Plus, Inc.” The Division’s affidavits do not mention this discrepancy and thus also do not provide any explanation for it. There is nothing in the record to establish whether “Edible Arrangements” is part of petitioner’s name or, alternatively, whether it refers to a separate business.

This discrepancy makes this case similar to *Matter of International Installations, Inc.* (Tax Appeals Tribunal, September 15, 1994). In that case, the identification numbers on the notice of deficiency at issue bore a suffix that did not appear on the identification number for the notice of deficiency shown in the CMR. There, the Tribunal rejected the granting of summary determination in the Division’s favor and remanded the matter, directing the Administrative Law Judge to “explain how she reached the conclusion that the mailing evidence related to the Notice of Deficiency submitted by petitioner” (*id.*). Thus, *Matter of International Installations* suggests that a discrepancy between a CMR’s description of a statutory notice and notice itself can be grounds for denying a timeliness-based motion for summary determination on the part of the Division if the discrepancy makes it impossible to know whether the statutory notice referred to in the CMR is the one under protest. Here, however, there is other information in the CMR that ties the CMR to the subject notice, namely the fact that the CMR and the subject bear the same certified control number (*see* Finding of Fact 9). This other link between the CMR and the subject notice is sufficient to allow the determination that the subject notice is the one shown by the CMR as having been mailed on April 8, 2016.

H. An aspect of proper mailing procedure, however, is that the notice be mailed to petitioner's last known address. Under Tax Law § 1138, a notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of tax at his or her last known address (Tax Law § 1138 [a] [1]). Tax Law § 1147 requires issuance of a notice of determination under article 28 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” (Tax Law § 1147 [a] [1]).

Here, the addition of “Edible Arrangements” under petitioner's name on the subject notice raises the question whether the subject notice was mailed to petitioner's last known address. According to the Domestic Mail Manual, with exceptions not applicable here, the intended recipient's name is a required element of an address (*see* Domestic Mail Manual 600 [Basic Standards For All Mailing Services], 602 [Addressing], 1.3 [Address Elements]). The Tribunal has rejected the argument that any deviation from the address on a taxpayer's last filed return results in a “failure to use the petitioner's last known address” (*Matter of George J. Perk, Jr.*, December 13, 2001). In *Matter of Combemale* (Tax Appeals Tribunal, March 31, 1994), the Tribunal confronted a situation where the address on a notice of deficiency substituted “Greene” for “C/O Arthur B. Greene.” The Tribunal found that the discrepancy caused the address used on the notice to fail the last known address requirement, reasoning that the Division's failure to include the “in care of” part of the proper address “eliminated the direction to the Postal Service to look for another addressee” (*id.*; *see also Matter of Stickel*, Tax Appeals Tribunal, April 11, 2011 [last known address requirement not satisfied where the notice of deficiency omitted suite number used on taxpayer's last filed return]). Here, because for all the

record shows, “Edible Arrangements” could refer to a business separate from petitioner operating at the same address, this added language created a risk that the subject notice would not be properly delivered to petitioner. Accordingly, in light of the Division’s unexplained addition of “Edible Arrangements” to the address used on petitioner’s last filed return, there is a material issue of fact as to whether the subject notice was mailed to petitioner’s last known address. Therefore, the Division has failed to establish that it is entitled summary determination in this matter.

I. The Division’s affidavits in this matter assert that a copy of the subject notice was also mailed to Mr. Schreiber, whom Ms. Picard’s affidavit refers to as petitioner’s “representative.” While the Tax Law does not specifically provide for service of a statutory notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer’s representative is not served with the statutory notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]). The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant CMR and thereby establish that a copy of the notice of determination was mailed to Mr. Schreiber at the Port Washington, New York address, on April 8, 2016. However, the affidavits submitted by the Division herein do not establish any basis for the use of that address for Mr. Schreiber. Moreover, there is nothing else in the record that shows that the Port Washington, New York, address is the correct address for Mr. Schreiber, whose name does not appear as representative on either the request for conciliation before BCMS

or on the petition in this matter. Therefore, a question of fact exists in regard to whether the Division properly mailed the subject notice to Mr. Schreiber.

J. The Division's motion for summary determination is denied and the Division is directed to serve its answer to the petition within 75 days of the date of this order.

DATED: Albany, New York
November 30, 2017

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE