

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ALFRED CATALANOTTO : ORDER
for Revision of Determinations or for Refund of Sales : DTA NO. 828222
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Periods Ended February 28, 2011, May 31, 2011 :
and November 30, 2011. :
:

Petitioner, Alfred Catalanotto, 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 ended February 28, 2011, May 31, 2011 and November 30, 2011.

On July 21, 2017, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) upon the basis that the petition had not been filed with the Division of Tax Appeals within the applicable period of time prescribed by statute. After being granted an extension of time to respond, petitioner, by Becker Tax Controversy Group LLC (Stuart Becker, CPA), submitted a response, and the Division of Taxation, by Amanda Hiller, Esq. (Stephanie M. Scalzo, Esq., of counsel), submitted affidavits and exhibits in support of the proposed dismissal of the petition, by the due date, October 5, 2017, which date commenced the 90-day period for the issuance of this order. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of three notices of estimated determination.

FINDINGS OF FACT

1. Petitioner, Alfred Catalanotto, filed a petition on June 9, 2017, in which he asserted that he was assessed as a responsible party for unpaid sales taxes for several periods between February and November, 2011. The petition asserted that the assessments included unpaid sales taxes, interest computed at 14.5% and penalties. The petition provided the following additional information:

“The taxpayer requested an abatement of the penalties and the DTF subsequently abated the penalty for the August, 2011 period only. Taxpayer paid the entire sales tax liability and then filed an informal protest, copy attached. In the protest, the taxpayer reiterated his request for an abatement of the penalties and added a request for a reduction of the interest down to the 7.5% statutory rate. Notwithstanding that the DTF found reasonable cause to abate the August 2011 period, on April 10, 2017 and again on May 15, 2017 the DTF denied the taxpayers’s request for abatement of the penalties for the other periods and for a reduction of the interest

* * *

In response to the denial of the informal protest, the taxpayer, on May 15, 2015, filed its Request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services (‘BCMS’). On June 2, 2017, the BCMS dismissed the request claiming that the request was filed more than ninety (90) days after February 26, 2016, which was the date of the issuance of the statutory notice for the August 31, 2011 period.”

2. In reviewing the petition, the Supervising Administrative Law Judge of the Division of Tax Appeals determined that the petition appeared to have been untimely filed and notified petitioner of his finding by a notice of intent to dismiss (NOI) dated July 21, 2017. The NOI advised petitioner that the petition was filed on June 9, 2017, which was 1170 days after the

issuance of the notices of estimated determination (notices), assessments L-040881280, L-040881282 and L-040881283, issued to petitioner, dated March 28, 2014.

3. To show proof of proper mailing of the March 28, 2014 notices to petitioner, the Division provided the following with its motion papers, along with the October 2, 2017 affidavit of Stephanie M. Scalzo, Esq.: (i) an affidavit, dated September 8, 2017, of Deena Picard, a data processing fiscal systems auditor 3 (since February 2006), and the acting director of the Management Analysis and Project Services Bureau (MAPS) of the Division (since May 2017), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (ii) an affidavit, dated September 13, 2017, of Fred Ramundo, a mail room supervisor in the Division (since December 2013); (iii) the “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked March 28, 2014; (iv) a copy of the Division’s notices issued to petitioner, dated March 28, 2014, bearing cover letters with certified control numbers 7104 1002 9730 0209 2269, 7104 1002 9730 0209 2283 and 7104 1002 9730 0209 2290, along with petitioner’s address at 70 Central Avenue, Pelham, New York 10803-1042; (v) the petition filed with the Division of Tax Appeals bearing a FedEx ship date of June 9, 2017, and date-stamped as received by the Division of Tax Appeals on June 13, 2017; and (vi) a representative copy of petitioner’s e-filed resident income tax return (Form IT-201) for tax year 2012, dated April 14, 2013.

4. The affidavits of Deena Picard set forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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 and a

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 PO ADDRESS."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to 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 reflect the actual mailing date of "3/28/14."

5. According to the Picard affidavit, the CMR in the present matter consists of 17 pages and lists 179 certified control numbers along with the corresponding assessment numbers, names and addresses. In addition, Ms. Picard stated that all pages of the CMR are banded together when the documents are delivered into the possession of the United States Postal Service (USPS) and remain so when returned to her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page. Ms. Picard notes that the portion of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She also stated that the USPS representative affixed a U.S. postmark to each page of the CMR, circled "179" on page 17, and initialed the same page.

6. Page 3 of the CMR indicates that statutory notices with certified control numbers 7104 1002 9730 0209 2269, 7104 1002 9730 0209 2283, and 7104 1002 9730 0209 2290 and

assessment ID numbers L-040881280, L-040881282 and L-040881283, respectively, were mailed to petitioner, Alfred Catalanotto, at 70 Central Avenue, Pelham, New York 10803-1042.

7. The affidavit of Fred Ramundo, the mail and supply supervisor, describes the operations and procedures with respect to the mailing of notices. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of the mail room staff weighs, seals and places postage on each envelope. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of thirty or fewer pieces of certified mail listed on the CMR are verified against the information contained on the CMR. A member of the mail room then delivers the envelopes and the CMR to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here the postal employee affixed a postmark to each page of the CMR, circled the number "179" beside the "Total pieces received at post office" and initialed or signed the certified mail record on that page to indicate that there were 179 total pieces, including the 3 notices addressed to petitioner, received at the post office on March 28, 2014.

8. The affidavits of Deena Picard and Fred Ramundo concluded that the procedures described by them were the normal and regular procedures for mailing items of certified mail by the Division on March 28, 2014, and such procedures were followed by the Division on that date for the mailing of petitioner's notices.

9. Petitioner's Pelham, New York, address on the petition, the CMR, the notices and their cover sheets match the address listed on petitioner's 2012 personal income tax return: 70 Central Avenue, Pelham, New York 10803. This was the last return petitioner filed with the Division before the issuance of the notices to him.

SUMMARY OF THE PARTIES' POSITIONS

10. As set forth in the petition, petitioner asserted the following:

“The taxpayer is filing the within petition to contest the decision of the BCMS as 1) the taxpayer’s claim was a claim for a refund which was submitted via an informal protest which protest was denied, at the earliest, on April 10, 2017, and so the 90 day period to file a request for conciliation did not begin to run until that date; and 2) the February 26, 2016 statutory notice [for period ended August 31, 2011] did not begin the 90 day clock for purposes of the filing of the BCMS request because, as stated previously, the taxpayer was requesting a refund of the penalties and interest and there were no penalties assessed pursuant to the statutory notice issued on February 26, 2016.”

In accordance with the request made in his informal protest, the taxpayer would like the DTF to abate the penalties of the February 2011, May 2011 and November 2011 sales tax periods and also reduce the interest assessed on the unpaid sales tax liabilities. It is the taxpayer’s position that, since the DTF found reasonable cause to abate the penalties for the August, 2011 period, then, by extension, reasonable cause also existed to abate the penalties and reduce the interest for the other periods, as the facts for the other subject period were exactly the same as for the August, 2011 period.”

11. In addition, petitioner indicated that he did not recall ever receiving the notices in issue, and even if it is determined that petitioner did not meet the statutory requirements of Tax Law § 1138 (a) (1), since petitioner’s actions amounted to requests for a refund of amounts paid, pursuant to Tax Law § 1139 (c), the claims should be deemed timely.

12. The Division maintained that the notices were properly mailed to petitioner in this case and the protests were untimely. The payment of the assessments and the claim for refund were not addressed by the Division.

CONCLUSIONS OF LAW

A. Tax Law § 1138 (a) (1) authorizes the Division of Taxation to issue notices of estimated determination for additional sales and use taxes due. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determinations, or alternatively, a

request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) within 90 days of the mailing of the notices of estimated determination (*see* Tax Law § 1138 [a] [1]; 20 NYCRR 3000.3 [c]). After this 90-day period, the amount of tax, penalty and interest specified in the notice becomes an assessment (*id.*). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002; *Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005). In this case, it appeared upon receipt of the petitions by the Division of Tax Appeals that they were filed late and notices of intent to dismiss petition were issued pursuant to Tax Law § 2006 (5) and 20 NYCRR 3000.9 (a) (4). Section 3000.9 (a) (4) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction.

B. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

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 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]).

D. 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 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557 [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 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [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 [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 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

E. Where, as here, the timeliness of a taxpayer’s petition has been raised by the Division, the initial inquiry focuses on the mailing of the notices because properly mailed notices create a presumption that such documents were delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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 (*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). When a notice is found to have been properly mailed by the Division to a petitioner’s 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).

F. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Deena Picard and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency. The Division also presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject notices were mailed as addressed to petitioner on the date claimed. Specifically, with respect to the notices in issue, the CMR lists certified control numbers with petitioners' names and addresses, and bears USPS postmarks dated March 28, 2014. Additionally, a postal employee circled "179" as the "total pieces received at post office," and added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon.

G. The Division has established that the notices dated March 28, 2014, were mailed to petitioner at the address appearing on his 2012 New York State personal income tax returns, the last return filed by petitioner as of the date of issuance of the March 28, 2014 notices.

H. Petitioner's response to the Division's motion claimed that petitioner filed informal claims for refund subsequent to payments of sales and use taxes for the periods in issue that could result in the tolling of the statute of limitations for the timely filing of a petition, and must be considered (*see* Tax Law 1139 [c]). Based upon the record herein, it cannot be determined

whether and when such payments were made, and the effect on the timely filing of the petition, and accordingly, such material and triable questions of fact must be addressed prior to a determination on the timeliness issue.

I. The notice of intent to dismiss petition is rescinded in accordance with Conclusion of Law H, and the Division will have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
December 28, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE