

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BROOKE MAPLES : ORDER
 : DTA NO. 830379
for Revision of Determinations or for Refund of New York :
State Sales and Use Taxes Under Articles 28 and 29 of the :
Tax Law for the Periods December 1, 2013 through :
February 28, 2014, September 1, 2014 through November :
30, 2014, and March 1, 2015 through November 30, 2015. :
:

Petitioner, Brooke Maples, 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 December 1, 2013 through February 28, 2014, September 1, 2014 through November 30, 2014, and March 1, 2015 through November 30, 2015.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), brought a motion dated November 16, 2021, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Fred Wightman, CPA, did not respond to the Division of Taxation's motion. The 90-day period for issuance of this order commenced on December 17, 2021. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination for the periods December 1, 2013 through February 28, 2014, September 1, 2014 through November 30, 2014, and March 1, 2015 through November 30, 2015.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of notices of determination, notice number L-046450712 for the period September 1, 2015 through November 30, 2015, notice number L-046450713 for the period June 1, 2015 through August 31, 2015, notice number L-046450714 for the period March 1, 2015 through May 31, 2015, notice number L-046450715 for the period September 1, 2014 through November 30, 2014, and notice number L-046450716 for the period December 1, 2013 through February 28, 2014, each dated May 22, 2017 (notices). The notices were addressed to "MAPLES – BROOKE A" at ** W***** Road, Westport, Connecticut 06880-5655 (hereinafter the Westport, CT, address).¹

2. Petitioner filed a request for conciliation conference (request), dated January 13, 2021, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. Petitioner's request was mailed on February 10, 2021 and received by BCMS on February 16, 2021.

¹ The address has been partially redacted for privacy.

3. On March 5, 2021, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notices 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 May 22, 2017, but the request was not mailed until February 10, 2021, 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 March 30, 2021.

5. To show proof of proper mailing of the notices, the Division provided the following: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated October 15, 2021; (ii) a certified mail register titled: “Certified Record For Presort Mail – Assessments Receivable” (CMR) postmarked May 22, 2017; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated October 22, 2021; (iv) a copy of the notices with the associated mailing cover sheets addressed to petitioner at the Westport, CT, address; (v) an affirmation of the Division's attorney, Mary R. Humphrey, dated November 16, 2021; and, (vi) a copy of petitioner's address summary from the Division's e-MPIRE database.

6. According to the affirmation of Ms. Humphrey, the address summary from the e-MPIRE database shows the Westport, CT, address was updated via the United States Postal Service National Change of Address (NCOA) database effective December 20, 2014 and this address corresponds to the address appearing on the notices. Ms. Humphrey further avers that the address summary shows that the address was updated on June 25, 2015 for physical purposes

and not mailing. According to the affirmation of Ms. Humphrey, the Westport, CT, address was petitioner's last known address at the time the notices were issued.

7. A review of the e-MPIRE address summary submitted shows the following information under the heading "Preview Address Data":

Seq #	Address ²	Notify Date	Posted Date	Nixie Flag	Nixie Date	Deliverability Status	Current Usage
011	**** S***** Pl, Charlotte, NC 28211-4920 US	1/13/2021	1/13/2021	0			Income
010	**** A***** Park Dr, Charlotte, NC 28277-2930 US	4/5/2019	4/5/2019	0			
009	*** H***** St, New York, NY 10014- 2496 US	6/25/15	6/25/15	0		High-Rise Unit Number Missing	
008	** W***** Rd, Westport, CT 06880- 5655 US	12/20/2014	12/20/2014	2	2/20/2019	Not Deliverable As Addressed	
007	* R***** Dr, Westport, CT 06880- 1307 US	1/5/2013	1/5/2013	0			
006	* W***** Ave, Westport, CT 06880-6848 US	5/15/2010	5/15/2010	0			
005	** H***** Rd, Westport,	10/15/2009	10/16/2009	0			

² The addresses have been partially redacted for privacy.

	CT 06880-6715 US						
004	*** M***** St 1S, New York, NY 10011-9198 US	4/18/2008	5/1/2008	0			
003	*** E **th St 4F, New York, NY 10016-4935 US	3/26/2007	4/2/2007	0			
002	*** E **th St 4F, New York, NY 10016-4935 US	5/16/2006	5/16/2006	0			
001	*** E **th St 34D, New York, NY 10016-5224 US	4/15/2005	4/15/2005	0			

The e-MPIRE address summary shows address details for address sequence numbers 8 and 9. The details for address sequence 8 states: “Address Source: NCOA/POSTAL (IN)” and includes the following information:

Usage

Tax Type	Sub Profile	Status	Usage	Effective Date / Time Stamp		Expiration Date / Time Stamp	
Personal Income Tax		Old	Phys & Mail	12/20/2014	16.41.37	06/25/2015	17.51.54
Personal Income Tax		Old	Mailing	06/25/2015	17.51.54	04/05/2019	12.39.14

The details for address sequence 9 states: “Address Source: RESP PERS WEB (W1)” and includes the following information:

Usage

Tax Type	Sub Profile	Status	Usage	Effective Date / Time Stamp	Expiration Date / Time Stamp
Personal Income Tax		Old	Physical	06/25/2015 17.51.54	04/05/2019 12.39.14

8. The affidavit of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is familiar with the Division’s Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with 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. 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 is manually changed on the first and last page of the CMR to the actual date of mailing of “5/22/17.” 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.

9. 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 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 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 P.O. ADDRESS."

10. The May 22, 2017 CMR consists of 29 pages and lists 312 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR 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 May 22, 2017 to each page of the CMR, initialed each page, and initialed, wrote and circled the number "312" on the last page next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE".

11. Page 1 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0132 0264 and assessment ID number L-046450712, was mailed to petitioner at the Westport, CT, address listed on the 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 noted. Page 2 of the CMR indicates that notices of determination with certified control numbers 7104 1002 9730 0132 0271, 7104 1002 9730 0132 0288, 7104 1002 9730 0132 0295, and 7104 1002 9730 0132 0301, and assessment ID numbers L-046450713, L-046450714, L-046450715, and L-046450716, respectively, were mailed to petitioner at the Westport, CT, address listed on the notices. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit "B," bear these certified control numbers and

petitioner's name and address as noted.

12. The affidavit of Susan Saccocio describes the general operations and procedures of the Division's mail room. Ms. Saccocio has been a manager in the mail room since 2017 and has been employed there since 2012 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail 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 the 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 CMRs, indicating receipt by the post office. The USPS employee initialed the last page of the CMR and affixed a postmark to each page of the CMR. 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. A review of the CMR indicates that the USPS employee complied with this request by writing and circling the number of pieces received on the CMR.

13. According to the affidavits submitted, copies of the notices were properly mailed to petitioner at the Westport, CT, address on the date indicated 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 of the Tax Appeals Tribunal (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, 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 determination 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, 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*).

D. Tax Law § 1138 (a) (1) authorizes the Division to mail notices of determination “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.” On the same point, Tax Law § 1147 (a) (1) provides that a notice of determination shall be mailed to the person for whom it is intended “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.” The mailing of a notice of determination to an individual at the address given in the last New York personal income tax return filed by that individual at the time of such mailing generally fulfills this requirement (*see Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *see also Matter of Chung*, Tax Appeals Tribunal, September 22, 2011). The mailing of a notice of determination to the taxpayer’s last known address is presumptive evidence of the receipt of that notice by the person to whom it is addressed (Tax Law § 1147 [a] [1]).

With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and any penalties, unless the person files a petition with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (*see* Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with 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).

E. Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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.*). To meet its burden, the Division must show proof of a standard procedure used for the issuance of statutory notices by one with knowledge of the relevant procedures and 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).

F. Here, the Division has offered sufficient proof of its standard mailing procedures through the affidavits of Ms. Picard and Ms. Saccocio, 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).

G. However, there remains a question of fact as to whether the notices were properly addressed to petitioner's last known address on the date they were issued. As noted above, for

purposes of article 28, a taxpayer's last known address is "the address given in the last return filed by him pursuant to the provisions of this article 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]). In this case, the Division did not present petitioner's last filed return or last application made, and has not affirmed whether no such return had been filed or application made. Instead, the Division presented copies of petitioner's address summary from its e-MPIRE database indicating that it received notice from NCOA on December 20, 2014 of the Westport, CT, address that was listed on the notices. The e-MPIRE database information appears to indicate that this address was effective for "PHYS & MAIL" usage from December 20, 2014 through June 25, 2015, and effective for "MAILING" from June 25, 2015 through April 5, 2019. The information also lists a "nixie date" of February 20, 2019, and "deliverability status" as "not deliverable as addressed." The e-MPIRE database information also appears to indicate a different address of *** H***** St., New York, New York 10014-2496 with a notify date and effective date of June 25, 2015 and expiration date of April 5, 2019. The database lists the address source for this address as "RESP PERS WEB (W1)" and indicates it is for "PHYSICAL" usage. According to Ms. Humphrey's affirmation, the address was updated on June 25, 2015 for physical purposes and not mailing. However, Ms. Humphrey's affirmation does not sufficiently explain or describe the information contained in the e-MPIRE database address summary. It is unclear from reviewing the summary whether petitioner had filed any return or application prior to the issuance of the notice, or if the address used was an address otherwise obtained by the Division if no return had been filed or application made (*see* Tax Law § 1147 [a] [1]).

Although petitioner did not respond to the Division's motion and presented no evidence

to contest the facts alleged in the Division's affidavits, and consequently, those facts are deemed admitted (*see Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*), the facts presented by the Division are insufficient to make a prima facie showing of entitlement to a determination in its favor as a matter of law. Specifically, while the affirmation of Ms. Humphrey concludes that "[w]hen the Notices under protest herein was [sic] issued, petitioner's last known address was ** W***** Rd., Westport, CT 06880-5655," the Division does not provide a basis for this conclusion. The affirmation does not state whether the address listed on the notices was the address given in the last return filed by petitioner or in any application made by him, or that no return had been filed or application made, and the address used, as listed in the e-MPIRE database, was such address as was obtainable. The Division's conclusory statement that such address was petitioner's "last known address" would require an assumption that no return was filed or application made by petitioner with a different address at the time the notices were issued.

The Division's conclusory statement would thus require this Administrative Law Judge to infer from the evidence submitted that no return was filed or application made showing a different address at the time the notice was issued. However, "[t]he function of a court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]). Here, the e-MPIRE database summary is unclear, and without testimony or an affidavit from one with knowledge of the information in the database providing an explanation of its meaning, there is at least a doubt as to the material and triable issue of whether the Division properly addressed the notice to petitioner's last known address (*Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965] [summary judgment should

not be granted where there is any doubt as to the existence of a triable issue]; *see also Matter of Marrero*, Tax Appeals Tribunal, May 21, 2020). By merely concluding that the notices were sent to petitioner's last known address, without affirming or presenting sufficient proof that such address was from the last return filed or application made, or was such address as was obtainable where no return was filed or application made, the Division has not "tender[ed] sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

H. The Division's motion for summary determination is denied without prejudice and the petition of Brooke Maples shall proceed in due course.

DATED: Albany, New York
March 17, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE