

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SOUNDVIEW PETROLEUM, INC.	:	ORDER
	:	DTA NO. 830622
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 June 1, 2016 through August 31,	:	
2019.	:	

Petitioner, Soundview Petroleum, 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 June 1, 2016 through August 31, 2019.

On June 7, 2022, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), brought a motion seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Morten L. Coren, P.C. (Lana Coren, CPA) did not respond to the motion. The 90-day period for issuance of this order commenced on July 7, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 issuance of a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Soundview Petroleum, Inc., in protest of a notice of determination, dated January 26, 2021, and bearing assessment ID number L-052788498 (notice). The notice is addressed to "SOUNDVIEW PETROLEUM INC." at a Bethpage, New York, address. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0279 9571.

2. A copy of the notice was also sent to petitioner's then-representative, Salvatore Abruzzo, under a mailing cover sheet that bore certified control number 7104 1002 9730 0279 9380 and the following address:

"SALVATORE ABRUZZO
SALVATORE ABRUZZO & COMPANY
54-40 LITTLE NECK PKWY
SUITE 2
LITTLE NECK, NY 11362."

3. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner's then-representative, Mr. Abruzzo, and was dated July 13, 2021. The request was faxed to and received by BCMS on July 13, 2021. The request lists petitioner's address as a Soundview Avenue, Bronx, New York, address, and its then-representative's address as Salvatore Abruzzo, 54-40 Little Neck Pkwy, Suite #4, Little Neck, NY 11362.

4. On August 6, 2021, BCMS issued a conciliation order dismissing request (conciliation order) (CMS No. 000331183) to petitioner. The conciliation 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 1/26/21, but the request was not faxed until 7/13/21, or in excess of 90 days, the request was late filed.”

5. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on August 23, 2021. The petition was date stamped received by the Division of Tax Appeals on August 25, 2021. In its petition, petitioner asserts that the auditor erroneously determined total taxable sales because he failed to account for nontaxable sales such as commissions and Lotto sales. Petitioner, in its petition, also asserts that “we never received the 90 day so that we can protest. Included in this petition is a letter sent directly to the auditor protesting his findings on January 11, 2021. Sent by certified mail.” Attachments to the petition, include, among other items, a letter, dated January 11, 2021, addressed to Alexander Fisher, at the Division’s Buffalo District Office,¹ proof that the letter was sent to Mr. Fisher by certified mail return receipt requested, and was received by an agent, V. Lucas, on January 15, 2021.² The following heading appears at the top of the January 11, 2021 letter:

“SAVATORE ABRUZZO AND COMPANY CPA’S
54-40 LITTLE NECK PARKWAY SUITE #4
LITTLE NECK, NEW YORK 11362
(516) XXX-XXXX.”

6. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated June 7, 2022, of Mary R. Humphrey, Esq., the Division’s representative; (ii) an affidavit, dated April 5, 2022, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record For Presort Mail –

¹ The letter from Salvatore Abruzzo expressed disagreement with “the Statement of Proposed Audit Change for Sales & Use Tax dated December 10, 2020,” issued to Soundview Petroleum Inc.

² Ms. Lucas’ signature and date appear on the copy of the PS Form 3811, Domestic Return Receipt attached to the petition.

Assessments Receivable” (CMR) postmarked January 26, 2021; (iv) an affidavit, dated April 6, 2022, of Susan Ramundo, a manager in the Division’s mail room; (v) copies of the notice mailed to petitioner and its then-representative with the associated mailing cover sheets; (vi) a copy of petitioner’s request for conciliation conference; and (vii) a copy of petitioner’s New York State and Local quarterly sales and use tax return (form quarterly ST-100) for the period September 1, 2020 through November 30, 2020 (ST-100 for the period September 1, 2020 through November 30, 2020), electronically filed on December 21, 2020.

7. Mary R. Humphrey, an attorney in the Office of Counsel of the Division, avers in her affirmation that petitioner’s ST-100 for the period September 1, 2020 through November 30, 2020 was filed on December 21, 2020, and that this was the last return filed before the Division issued the notice. Ms. Humphrey affirms that the Bethpage, New York, address appearing on the last return filed, corresponds to the address appearing on the notice.

8. Ms. Humphrey, in her affirmation, asserts that the “Notice was also mailed to petitioner’s representative, Salvatore Abruzzo, at his address of record, 54-40 Little Neck Pkwy, Suite 2, Little Neck, NY 11362.” She asserts the “petitioner’s representative’s last known address was 54-40 Little Neck Pkwy, Suite 2, Little Neck, NY 11362.” There is no evidence attached to the motion to verify this assertion regarding petitioner’s then-representative’s last known address.

9. The affidavit of Deena Picard sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case “20210191700.” 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 “1/26.” In addition, as described by Ms. Picard, generally 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 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.

10. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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 PO Address.”

11. The CMR in the present matter consists of 16 pages and lists 168 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 16 which contains 3 entries. Ms. Picard notes that the copy 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. A USPS employee affixed a postmark, dated January 26, 2021, to each page of the CMR, wrote the number “168” on page 16 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed the last page of the CMR.

12. Page 8 of the CMR indicates that a notice with certified control number 7104 1002 9730 0279 9571, and reference number L-052788498 was mailed to petitioner, “SOUNDVIEW PETROLEUM INC.” at the Bethpage, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

13. Page 6 of the CMR indicates that a notice with certified control number 7104 1002 9730 0279 9380, and reference number L-052788498 was mailed to petitioner’s then-representative, Salvatore Abruzzo at “54-40 LITTLE NECK PKWY SUITE 2 LITTLE NECK, NY 11362.” The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and the following name and address”

“SALVATORE ABRUZZO
54-40 LITTLE NECK PKWY
SUITE 2
LITTLE NECK NY 11362.”

14. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo confirms that 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

15. Each of the 16 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of January 26, 2021. On page 16, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 168 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "168," indicating 168 pieces of mail were received by the USPS. There is a set of initials on page 16.

16. According to both the Picard and Ramundo affidavits, a copy of the notice was properly mailed to petitioner on January 26, 2021, as claimed.

CONCLUSIONS OF LAW

A. A motion for summary determination “shall be granted if, upon all 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 of Practice and Procedure of the Tax Appeals Tribunal (Rules) provides that a motion for summary determination is subject to the same provisions as a motion for summary determination pursuant to CPLR 3212. “The proponent of a summary determination 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.*, 22NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [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. Petitioner did not respond to the Division’s motion. Therefore, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99

AD2d 227, 229 [1st Dept 1984] *appeal dismissed* 62 NY2d 942 [1984]). However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, at 574; *see also Weiss v Garfield*, 21 AD2d 156, 158 [3d Dept 1964]).

D. 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 protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such 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 request for conciliation conference is in question, 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 (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air*

Flex Custom Furniture, Tax Appeals Tribunal, November 25, 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).

F. When a statutory notice is found to have been properly mailed by the Division, i.e. sent to the taxpayer (and its representative, if any) at its 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 Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

G. Here, the Division introduced proof sufficient to establish the mailing of the notice to petitioner's last known address on January 26, 2021. The CMR has 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). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conform with the address listed on petitioner's electronically filed ST-100 for the period September 1, 2020 through November 30, 2020, which was the last return filed by petitioner before the notice was mailed, and thus satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice to petitioner on

January 26, 2021, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

H. Petitioner has offered no evidence to counter the Division's evidence that the notice of determination was issued on January 26, 2021. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011; *see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]).

I. While the Tax Law does not specifically provide for the 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 Brager*, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v Frank*, 43 NY2d 168 [1977]). Documents in the record indicate that a copy of the notice was issued to petitioner's then-representative at a 54-40 Little Neck Pkwy, Suite 2, Little Neck, New York, address. However, a 54-40 Little Neck Pkwy, Suite #4, Little Neck, New York, address was listed for petitioner's then-representative on a January 11, 2021 letter to the Division and the request for conciliation conference. The difference in the address has not been explained. There is no evidence of actual delivery or a specific date of receipt of the notice of determination by petitioner's then-representative. As such, it is impossible to determine

whether the notice was served on the representative. Accordingly, the Division's motion is denied.

J. The Division of Taxation's motion for summary determination is denied. A hearing will be scheduled in due course.

DATED: Albany, New York
September 29, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE