

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

POLLO D. MARIA, CORP. :

ORDER
DTA NO. 831211

For a Revision of a Determination or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law for :
the Periods March 1, 2016 through August 31, 2018 and :
December 1, 2019 through May 31, 2020. :
_____ :

Petitioner, Pollo D. Maria, Corp., filed a petition for a revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods March 1, 2016 through August 31, 2018 and December 1, 2019 through May 31, 2020.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), brought a motion on September 22, 2023, 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 Steven P. Sheffler, Esq., responded to the motion on October 20, 2023. The 90-day period for the issuance of this order commenced on October 23, 2023.

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 conciliation conference with the Bureau of Conciliation and Mediation Services following the 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 petitioner's protest of a notice of determination, dated April 8, 2021, and bearing audit case identification number X-189549268 (notice).¹ The notice was addressed to petitioner, Pollo D. Maria, Corp., at an address in Jackson Heights, New York.

2. On September 16, 2022, petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS). The request states that petitioner is requesting a conciliation conference for sales tax for the periods "08/31/2018; 02/29/2020; 05/31/2020" for a notice dated "06/10/2022" with notice number "L-055511768-4."

3. On October 21, 2022, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 000344771, to petitioner for the tax periods "03/01/2016 – 08/31/2018, 03/01/2020 – 05/31/2020, 12/01/2019 – 02/29/2020" for notice numbers "L-053118801-9, L-053118799-9, L-053118800-1." The conciliation order determined that petitioner's protest of the notices was untimely and stated, in part, that:

"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, 2021, but the request was not faxed until September 16, 2022, or in excess of 90 days, the request is late filed."

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on January 10, 2023.

5. To show proof of proper mailing of the notices, the Division, by affirmation of Elizabeth Lyons, Esq., dated September 22, 2023, submitted the following with its motion

¹ The notice states that it was issued to petitioner as a bulk sale purchaser liable for taxes determined to be due in accordance with Tax Law §§ 1141 (c) and 1138 (a) (3). The computation summary section of the notice lists the following as "Purchaser's Assessment ID" numbers and periods: L-053118799-9 for the period ended May 31, 2020; L-053118800-1 for the period ended February 29, 2020; and L-053118801-9 for the periods ended May 31, 2016 through May 31, 2017 and November 30, 2017 through August 31, 2018.

papers: (i) an affidavit, dated July 14, 2023, of Marianna Denier, a Principal Administrative Analyst and 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, 2021; (iii) an affidavit, dated July 17, 2023, of Susan Ramundo, a manager in the Division's mail room; (iv) a copy of the notice, dated April 8, 2021, mailed to petitioner with the associated mailing cover sheet; (v) a copy of petitioner's request faxed on September 16, 2022 and the conciliation order issued to petitioner on October 21, 2022; and (vi) a copy of petitioner's form ST-100, New York State and Local quarterly sales and use tax return for the period December 1, 2020 through February 28, 2021 (sales tax return), dated March 22, 2021, which lists the same address for petitioner as was listed on the notice. The sales tax return was the last return filed with the Division by petitioner before the notice was issued.

6. The affidavit of Marianna Denier, who has been in her current position since August of 2022, and has worked as a supervisor in MAPS since October of 2004, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier is the Director of MAPS, which is responsible for the receipt and storage of CMRs. She is familiar with the Division's Case and Resource Tracking System (CARTS) as well as 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 was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "4/8." In addition, as described by Ms. Denier, 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.

7. 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 PO Address."

8. The CMR in the present matter consists of 14 pages and lists 153 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 14, which contains 10 entries. Ms. Denier 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, 2021 to each page of the CMR, wrote the number "153" on page 14, next to the heading "Total Pieces Received at Post Office," and initialed or signed page 14.

9. Page 8 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0305 4464 and reference number X-189549268 was mailed to petitioner at the Jackson Heights, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit "B," bears the certified control number

and petitioner's name and address as noted. Additionally, as averred by Ms. Denier and supported by the documents, the audit case identification number of X-189549268 appearing on the notice is identical to the reference number listed on page 8 of the CMR for the entry with petitioner's name and address.

10. The affidavit of Susan Ramundo describes the mail room's general operations and procedures. Ms. Ramundo has been a manager in the mail room since 2017 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. Ramundo 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 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.

11. Each of the 14 pages of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark of April 8, 2021. On page 14, corresponding to "Total Pieces and Amounts," is the preprinted number 153 and next to "Total Pieces Received at Post Office," the USPS employee wrote the number "153," wrote his or her initials or a signature, and affixed a

postmark. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials or signature indicate that all of the 153 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on April 8, 2021.

12. According to both the Denier and Ramundo affidavits, a copy of the notice was mailed to petitioner on April 8, 2021, as claimed.

CONCLUSIONS OF LAW

A. 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]).

B. Section 3000.9 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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 Village 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 v City of New York*, 49 NY2d at 562).

C. 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 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).

D. 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 both the fact and date of the mailing of the notice to petitioner’s last known address (*see* Tax Law § 1147 [a] [1]; *see also 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).

E. Here, the Division has offered sufficient proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, 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). The Division's affidavits and exhibits do not, however, unquestionably demonstrate that such procedures were followed in this case. Specifically, while Ms. Denier avers, and the documents show, that the audit case identification number of X-189549268 appearing on the notice is identical to the reference number listed on page 8 of the CMR for the entry with petitioner's name and address. However, paragraph 5 of Ms. Denier's affidavit states that "[t]he assessment numbers are listed under the second heading, entitled 'REFERENCE NO.'" It is unclear from the affidavit whether "REFERENCE NO[s]" also include audit case identification numbers. Further, there is no explanation why "Purchaser's Assessment ID" numbers L-053118799, L-053118800 and L-053118801 are also listed on the subject notice in addition to the audit case identification number, yet these assessment numbers do not appear on the CMR, despite Ms. Denier's statement that assessment numbers are listed under the heading "REFERENCE NO."

F. There is also a question of fact as to why petitioner's request for a conciliation conference, included with the Division's motion papers, states that the notice date and notice number being protested are June 10, 2022 and L-055511768, respectively, but the BCMS order lists the notice numbers as L-053118801, L-053118799, and L-053118800 and states that the notice was issued on April 8, 2021. Without further explanation, it is unclear whether petitioner's request was protesting a notice other than the one addressed by the conciliation

order. Furthermore, there is no explanation as to why the subject notice included in the Division's motion papers lists the periods ended May 31, 2020; February 29, 2020; May 31, 2016 through May 31, 2017 and November 30, 2017 through August 31, 2018, yet the conciliation order lists the tax periods as "03/01/2016 – 08/31/2018, 03/01/2020 – 05/31/2020, 12/01/2019 – 02/29/2020" (i.e., the conciliation order includes an additional period of June 1, 2017 through August 31, 2017). Based on the foregoing, the Division has failed to make a prima facie showing of entitlement to summary determination in its favor as a matter of law.

G. Petitioner's argument that the Jackson Heights, New York, address listed on the notice was improper is rejected. Petitioner contends that the Jackson Heights, New York, address was the address of petitioner's accountant and that the notice should have been sent to an address in Corona, New York. However, Tax Law § 1147 (a) (1) provides, in relevant part, that a notice of determination shall be mailed to "the address given in the last return filed . . . pursuant to the provisions of [Article 28]" The notice at issue here was mailed to the same address appearing on petitioner's sales tax return, which was the last return filed by petitioner prior to the issuance of the notice. As such, petitioner's argument regarding the address is without merit. While petitioner has failed to 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 at 449, citing *Zuckerman v City of New York*, 49 NY2d at 562), nevertheless there remains questions of fact based on the Division's own motion papers, as discussed above.

H. The Division of Taxation's motion for summary determination is denied without prejudice and a hearing will be scheduled in due course.

DATED: Albany, New York
December 21, 2023

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE