

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROSA GUERRERO	:	ORDER
	:	DTA NO. 850871
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 1, 2010 through November	:	
30, 2012.	:	

Petitioner, Rosa Guerrero,¹ 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 1, 2010 through November 30, 2012.

On August 2, 2024, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), brought a motion seeking an order dismissing the petition or, in the alternative, for summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, filed an untimely response to the motion.² The 90-day period for issuance of this order commenced on September 3, 2024.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings submitted in this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ Documents in the record appear to indicate that Ms. Guerrero was also known as Rosa C. Noboa.

² Petitioner and a petitioner in another matter assigned DTA No. 850870 sent a joint response in opposition to the motion to dismiss or for summary determination by United States Postal Service (USPS) certified mail on September 5, 2024.

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 Rosa Guerrero's protest of a notice of determination, dated June 6, 2013, and bearing assessment ID number L-039510334 (notice). The notice asserted sales and use taxes due for the period March 1, 2010 through November 30, 2012. It was issued to petitioner as an officer or responsible person of CJ Bar & Restaurant Inc. The notice is addressed to "NOBOA-ROSA C" at a Bronx, New York, address. The mailing cover sheet of this notice bore certified control number 7104 1002 9730 1572 4034.

2. On or about January 12, 2024, petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notice L-039510334.³ The request was stamped received by BCMS on January 24, 2024.

3. On February 9, 2024, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. Bearing CMS No. 000358409 and referencing notice number "L-039510334-1," the conciliation order dismissed the request, and stated, in part, that:

"The notice at issue, by law, shall not be construed as a notice which gives a person rights to a hearing. If the notice is full paid and a timely refund filed, denial of such refund may afford rights.

Therefore, [BCMS] is precluded from making a determination on the merits of this case.

The request filed for a Conciliation Conference is dismissed."

³ The request was jointly filed with the petitioner in DTA No. 850870 and protested another notice in addition to the one at issue herein.

4. On May 8, 2024, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order.

5. To show proof of proper mailing of the notice, the Division, by affirmation of Brian Evans, Esq., dated August 2, 2024, submitted the following with its motion papers: (i) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS), sworn to on June 18, 2024; (ii) a copy of a "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR), postmarked June 6, 2013; (iii) a copy of the notice with the associated mailing cover sheet addressed to petitioner; (iv) an affidavit of Susan Ramundo, a manager of the Division's mail room, sworn to June 20, 2024; and (v) a copy of petitioner's request for conciliation conference and the conciliation order issued by BCMS on February 9, 2024.

6. Mr. Evans in his affirmation asserts that the notice "was properly mailed to Petitioner's last known address at the time of mailing." There is no evidence attached to the motion to verify this assertion regarding petitioner's last known address.

7. Ms. Denier has served as the Director of MAPS since July 2022. Prior to that, she was supervisor in MAPS since October 2004. She is also a Principal Administrative Analyst and has held that position since August 2022. Prior to this position, Ms. Denier was a supervisor of Administrative Analysis from July 2019 through August 2022. In performing her duties, Ms. Denier has used the Division's Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of determination. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices. Ms. Denier's affidavit sets forth the Division's general practice and procedure for processing statutory notices.

8. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer information on the back. CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

9. Each batch of statutory notices is accompanied by a CMR. The CMR lists each notice in the order it is generated in the batch. The certified control numbers are listed on the CMR under the heading entitled "CERTIFIED NO." The statutory notice numbers are listed on the CMR under the heading "REFERENCE NO." The names and addresses of the recipients are listed under "NAME OF ADDRESSEE, STREET, AND P.O. ADDRESS." Each CMR and associated batch of statutory notices are forwarded to the mail room together. All pages of the CMR are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division after mailing. 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. The CMR in the present matter consists of 32 pages and lists 342 certified control numbers along with corresponding assessment numbers, names and addresses. Each page includes 11 such entries with the exception of page 32 which contains one entry. Ms. Denier 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 the proceeding.

11. The CMR was produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and listed an initial (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 “20131501700.” Following the Division’s general practice, the date was manually changed on the first and last page of the CMR in the present case to “6/6/13.” This was done to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. On page 32, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 342. A USPS employee initialed or signed and affixed a postmark, dated June 6, 2013, of the Colonie Center, New York, branch of the USPS to each page of the CMR and wrote and circled the number “342” on page 32 next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and, as noted, initialed or signed the last page of the CMR.

12. Page 8 of the CMR indicates that a notice with certified control number 7104 1002 9730 1572 4034 and reference number L 039510334 was mailed to petitioner, “NOBOA-ROSA C” at the Bronx, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

13. Ms. Ramundo, a manager of the Division’s mail room, describes the mail room’s general operations and procedures in her affidavit as they relate to statutory notices. Ms. Ramundo has been a manager of the mail room since 2017 and has been employed there since 2012 as a Senior Administrative Analyst. As a mail room manager, Ms. Ramundo is knowledgeable regarding past and present office procedures as they relate to statutory notices.

Ms. Ramundo's official title is Associate Administrative Analyst, and her duties include managing the staff that delivers mail to branch offices of the USPS.

14. The mail room receives statutory notices that are ready for mailing in an "Outgoing Certified Mail" area. Each notice in the batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A staff member receives the notices and associated documents and operates a machine that puts each notice and associated documents in a windowed envelope so that the address and certified number from the mailing cover sheet shows through the windows. That staff member then weighs, seals, and places postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail against the information contained on the CMR. Then the clerk performs a random review of up to 30 pieces of certified mail 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 in the Albany, New York, area. A USPS employee affixes a postmark and writes his or her initials or signature on the CMR, indicating receipt by the post office of the mail listed on the CMR and of the CMR itself. The mail room also 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 32 pages of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark of June 6, 2013. On page 32, corresponding to "TOTAL PIECES

AND AMOUNTS” is the preprinted number 342 and next to “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten and circled entry “342,” indicating that 342 pieces of certified mail were received by the USPS. A USPS employee initialed or signed page 32.

16. According to the Denier and Ramundo affidavits, a copy of the notice was mailed to petitioner on June 6, 2013, as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition or, in the alternative, a motion for summary determination under section 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules). As the petition in this matter was filed within 90 days after the issuance of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition (*see* Tax Law § 170 [3-a] [e]; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991) 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 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 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]). It is not for the court to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (***Daliendo v Johnson***, 147 AD2d 312, 317 [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]).

D. 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 [petition filed one day late dismissed]). 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 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* Tax Law § 1147 [a] [1]; *see also 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, 1992). 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 New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*).

F. Where a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, there is a presumptive evidence of receipt (*see* Tax Law §§ 1138 [a] [1]; 1147 [a] [1]). The taxpayer can rebut this presumption (*see Matter of United Grocery & Deli*, Tax Appeals Tribunal, June 13, 2024). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*see Matter of New York City Billionaires Constr. Corp.*, *see also Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

G. In this case, the Division has introduced adequate 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).

H. The CMR provides sufficient documentary proof to establish that a notice, dated June 6, 2013, was mailed as addressed to petitioner. The 32-page document lists 342 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark, dated June 6, 2013, and the initials or signature of a USPS employee. Additionally, on the last page of the CMR, the postal employee wrote and circled the number “342” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

I. The only remaining issue on this motion is the question of whether the notice was addressed to petitioner at her last known address at the time it was mailed, so as to be considered “properly mailed” (*see Matter of New York City Billionaires Constr. Corp.*). Tax Law § 1147 (a) (1) requires that the notice to be addressed 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 Division failed to produce any evidence of petitioner’s last known address at the time of the issuance of the notice. Since there is a material issue of fact, the Division’s motion must be denied.

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

DATED: Albany, New York
November 27, 2024

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE