

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

**NEW YORK CITY BILLIONAIRES
CONSTRUCTION CORP.** :

DECISION
DTA NO. 823684

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 September 1, 2002 through August 31, 2008.

Petitioner, New York City Billionaires Construction Corp., filed an exception to the determination of the Administrative Law Judge issued on February 17, 2011. Petitioner appeared by Ludwig Sheppard, EA. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

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

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated October 26, 2009 and bearing assessment identification number L-032810857. The Notice is addressed to petitioner, New York City Billionaires Construction Corp., at a Rosedale, New York, address.

Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the October 26, 2009 Notice of Determination. The request is dated March 21, 2010 and was received by BCMS on March 24, 2010.

On April 9, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on October 26, 2009, but the request was not mailed until March 22, 2010, or in excess of 90 days, the request is late filed.

To show proof of proper mailing of the October 26, 2009 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated November 3, 2010, of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated November 4, 2010, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked October 26, 2009; (iv) an affidavit, dated November 4, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) two Postal Service forms 3811-A (Request for Delivery Information/Return Receipt after

Mailing) and USPS responses to such requests dated September 13, 2010; and (vi) petitioner's quarterly sales tax return for the period ended August 31, 2009, dated September 9, 2009, which lists the same address for petitioner as that listed on the subject Notice.¹

The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices, as follows. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 page to the actual mailing date of "10/26/09."

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 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." The CMR in the present matter consists of 8 pages and lists 84 certified control numbers along with corresponding assessment numbers, names and addresses. There are no deletions from the list.

Here, page 5 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1640 8544 and assessment ID number L-032810857 was mailed to petitioner at the Rosedale, New York, address listed on the subject Notice of Determination. The

¹ The same address for petitioner is also listed on its Request for Conciliation Conference dated March 21, 2010 and on its petition, dated June 9, 2010.

corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

Page 4 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1640 8407 and assessment ID number L-032810857 was mailed to petitioner's representative in this matter, Ludwig Sheppard, at a Brooklyn, New York, address. The corresponding mailing cover sheet bears this certified control number and lists Mr. Sheppard's name and address as noted.

The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures, as follows. The Center receives the notices and places them in an "Outgoing Certified Mail" area. 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 envelopes are counted and the names and certified control numbers verified against 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 signature on the CMR, indicating receipt by the post office. The Center 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 submitted by the Division confirms that a USPS employee postmarked and initialed pages 1 through 8 of the CMR. The postmarks are dated October 26, 2009. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 84, which has not been circled. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," which is blank.

According to the Sears affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 84 articles of mail listed on the CMR, including the articles addressed to petitioner and its representative, were received by the USPS on October 26, 2009.

According to both the Sears and Peltier affidavits, a copy of the subject Notice was mailed to petitioner and to its representative on October 26, 2009, as claimed.

The affidavit of Heidi Corina describes the Division's requests to the Postal Service for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to articles of mail bearing certified control numbers 7104 1002 9730 1640 8544 and 7104 1002 9730 1640 8407. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1640 8544 and addressed to petitioner was returned to the Division on November 20, 2009. A copy of the envelope indicates that this article of mail was unclaimed by the addressee. The USPS response to the Division's request for information also indicates that the article of mail bearing certified control number 7104 1002 9730 1640 8407 and addressed to petitioner's representative was delivered as addressed on October 28, 2009.

The power of attorney form attached to petitioner's petition lists the same Brooklyn address for petitioner's representative as that listed on the CMR.

Attached to petitioner's petition is a letter addressed to petitioner, dated January 14, 2010, from the Division section head involved in the audit. The letter indicates that an audit of petitioner's records was completed and that, based on the audit findings, petitioner owes additional tax, plus interest and penalties. Also attached to the petition is a February 18, 2010 Notice and Demand issued to petitioner seeking payment of the subject assessment. The petition

asserts that petitioner's Request for Conciliation Conference was timely relative to these documents.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination may be granted if it has been sufficiently established that no material and triable issue of fact is presented and that the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party. The Administrative Law Judge concluded that as petitioner did not respond to the Division's motion, it was deemed conceded that no question of fact requiring a hearing exists.

The Administrative Law Judge noted that Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination where a return required by Article 28 of the Tax Law is not filed, or if a return when filed is incorrect or insufficient. Further, the Administrative Law Judge pointed out that Tax Law § 1138(a)(1) provides that the notice be mailed by certified or registered mail to the person or persons liable at his last known address.

The Administrative Law Judge pointed out that a taxpayer may file a petition with BCMS seeking revision of such determination within 90 days of the mailing of the Notice of Determination. The Administrative Law Judge observed that the Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit.

The Administrative Law Judge found that where the timeliness of a petition or request for a conciliation conference is at issue, the Division has the burden of proving the fact and date of mailing of a statutory notice to petitioner's last known address. The Administrative Law Judge noted that the Division must prove a standard procedure used by it for the issuance of a notice of

determination by one with knowledge of the relevant procedures, and must also prove that the standard procedure was followed in the particular instance in question.

Based on the submitted affidavits of its employees together with other documentary evidence, the Administrative Law Judge concluded that the Division had established that it mailed the Notice of Determination to petitioner and petitioner's representative by certified mail on October 26, 2009 at their last known addresses. As petitioner's request for a conciliation conference was filed on March 22, 2010, which was beyond the 90-day period, the Administrative Law Judge held that the Division of Tax Appeals has no jurisdiction over this matter and summary determination was granted in favor of the Division.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that neither it nor its representative received the Notice of Determination. Petitioner also requests an opportunity to present records and data that were not available at the time of the audit.

The Division argues that the Administrative Law Judge correctly decided the relevant issues and the determination should be affirmed.

OPINION

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that 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]).

That section further 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]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*see Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276 [1978]).

We agree with the Administrative Law Judge that because petitioner did not respond to the Division’s motion, petitioner is deemed to have conceded that no questions of fact requiring a hearing exist. Petitioner failed to present any evidence contesting the facts alleged in the affidavits submitted by the Division. As such, those facts were properly deemed admitted.

When the timeliness of a petition or a Request for Conciliation Conference is at issue, the Division must establish proper mailing of the notice of determination to petitioner at his last known address (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To meet its burden of proof, the Division is required to show proof of a standard procedure used by it, and must further show proof that the standard procedure was followed in this instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). We find that the Division has met its burden of proof to establish proper mailing of the Notice of Determination to petitioner on October 26, 2009, by submitting affidavits describing its general mailing procedures and the relevant mailing record, together with the USPS delivery information that establishes the mailing of the subject Notice (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

We agree with the Administrative Law Judge in that the CMR, although otherwise properly prepared, is flawed because “Total Number of Pieces Received at Post Office” was left blank (*see e.g. Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *Matter of*

Brager, Tax Appeals Tribunal, May 23, 1996; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Sabando Auto Parts*, Tax Appeals Tribunal, March 9, 1995; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). However, as the Administrative Law Judge properly noted, such a flaw may be overcome by other evidence of mailing in the record such as testimony of a postal employee, an original envelope or evidence that other notices listed in the certified mail record had been delivered (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). Specifically, this Tribunal has held that confirmation from the USPS that the piece of certified mail in question was delivered constitutes “‘evidence other than a flawed certified mail record and affidavit of habit’ which provides a sufficient basis for concluding that the Notice of Deficiency was mailed” (*Matter of Rywin, supra; see also Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992; *Matter of Kropf*, Tax Appeals Tribunal, March 21, 1991).

In the present case, the record includes Postal Service Form 3811-A, Request for Delivery Information/Return Receipt After Mailing, which the Division filed with the Postal Service, and the response received from the post office. The USPS delivery information shows that a copy of the Notice addressed to petitioner’s representative, which was also listed on the CMR, was delivered as addressed on October 28, 2009. The USPS delivery information also shows that the Notice addressed to petitioner was returned to the Division as unclaimed on November 20, 2009. The return of such Notice to the Division as unclaimed requires the inference that the Notice was, in fact, mailed to petitioner on October 26, 2009. Therefore, we agree with the Administrative Law Judge that the Division has presented sufficient evidence to overcome the flaw in the CMR,

and that such evidence, along with the CMR, establishes the fact of mailing of the Notice on October 26, 2009.

Tax Law § 1138(a)(1) requires that the Notice of Determination “shall be mailed 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.” We agree with the Administrative Law Judge that the address to which the Notice of Determination was sent was petitioner’s last known address, as it was the same address that appeared on the sales tax return for the quarter ended August 31, 2009. The same address was also on the request for a conciliation conference and the petition. We also agree with the Administrative Law Judge that a copy of the Notice of Determination was mailed by certified mail to petitioner’s appointed representative at his last known address.

Petitioner claims that neither it nor its representative received the Notice of Determination. While the taxpayer has the right to rebut the presumption of delivery, the rebuttal must consist of more than a mere denial of receipt (*Matter of American Cars ‘R’ Us v. Chu.*, 147 AD2d 797 [1989]). The Division has submitted sufficient evidence of the mailing of the Notice of Determination to raise the presumption, under section 1147(a)(1) of the Tax Law, that the Notice of Determination was received. Under these circumstances, the Division need not prove actual receipt by the taxpayer, and petitioner’s mere denial of receipt is not sufficient to rebut the presumption (*Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]). Moreover, the Administrative Law Judge properly found that this presumption is not rebutted by the fact that the Notice addressed to petitioner was returned to the Division as unclaimed. The evidence submitted by the Division indicates that the proper mailing procedures were followed. Based on the evidence in the record, including petitioner’s continued use of the

same address listed on the Notice, the Administrative Law Judge reasonably equated the unclaimed Notice with petitioner's refusal to accept delivery and thus properly deemed the Notice as constructively received.

As petitioner's request for a conciliation conference was not filed until March 22, 2010, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New York City Billionaires Construction Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of New York City Billionaires Construction Corp. is dismissed.

DATED:Troy, New York
October 20, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner