

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
WILLIAM CHIN : DECISION
 : DTA NO. 825951
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2006 through November 30, 2011. :

Petitioner, William Chin, filed an exception to the determination of the Administrative Law Judge issued on January 8, 2015.¹ Petitioner appeared by Paul Tong, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq.).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision commenced on June 8, 2015, the due date for petitioner's reply brief.

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

¹ The petition in this matter was filed in protest of two notices of determination, numbered L-039186510 and L-039186567, respectively. The Administrative Law Judge denied the petition with respect to L-039186510 in an order issued on July 10, 2014. The Administrative Law Judge subsequently denied the petition with respect to L-039186567 in the determination issued on January 8, 2015. As the July 10, 2014 order did not "finally determine all matters and issues contained in the petition," the issue of whether the Administrative Law Judge properly denied the petition with respect to L-039186510 pursuant to the order is properly before this Tribunal on exception in accordance with section 3000.5 (f) of the Rules of Practice and Procedure (Rules) (20 NYCRR 3000.5 [f]).

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination.

FINDINGS OF FACT

We agree with the facts as determined by the Administrative Law Judge in the July 10, 2014 order and the January 8, 2015 determination. The facts set forth below are a consolidation of those facts. We have made non-substantive modifications to avoid repetition and to reflect the present context.

1. The subject of the instant matter is the timeliness of petitioner's request for conciliation conference, filed in protest of two notices of determination, both dated April 2, 2013, and bearing assessment identification numbers L-039186510 and L-039186567, respectively. Both notices are addressed to petitioner, William Chin, at an address in Fresh Meadows, New York.

2. Petitioner filed his request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on September 26, 2013.

3. On October 18, 2013, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notices 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 notices were issued on April 2, 2013, but the request was not mailed until September 26, 2013, or in excess of 90 days, the request is late filed.”

4. On November 1, 2013, petitioner filed a petition with the Division of Tax Appeals asserting the timeliness of his conciliation conference request.

5. The Division of Taxation (Division) brought a motion dated April 1, 2014 seeking an order dismissing the petition pursuant to section 3000.9 (a) of the Tribunal's Rules of Practice and Procedure (Rules) (20 NYCRR 3000.9 [a]), or in the alternative, summary determination denying the petition pursuant to section 3000.9 (b) of the Rules (20 NYCRR 3000.9 [b]).

6. In support of its April 1, 2014 motion and to prove proper mailing of the April 2, 2013 notices of determination, the Division provided the following evidence with its motion papers: i) an affidavit, dated February 7, 2014, of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) pages numbered 1, 179, and 316 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), each legibly postmarked April 2, 2013; (iii) an affidavit, dated February 7, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated February 7, 2014, 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 the USPS responses to such requests dated January 30, 2013; (vi) a copy of the April 2, 2013 notices of determination with the associated mailing cover sheets; and (vii) petitioner's resident income tax return for the year 2011, dated October 15, 2012, which lists the same address for petitioner as that listed on the subject notices. The 2011 return was the last return filed with the Division by petitioner before the notices were issued.

7. Petitioner did not respond to the Division's April 1, 2014 motion.

8. On July 10, 2014, the Administrative Law Judge issued an order that granted the Division's motion, and thus denied the petition herein, with respect to notice of determination

L-039186510. The order denied the Division's motion with respect to notice of determination L-039186567 without prejudice to renewal.

9. As a consequence of such denial, the Division brought a motion dated September 12, 2014 seeking an order dismissing the petition, or in the alternative, summary determination denying the petition, with respect to notice of determination L-039186567.

10. Petitioner did not respond to the Division's September 12, 2014 motion.

11. In support of its September 12, 2014 motion and to prove proper mailing of notice of determination L-039186567, the Division provided the following evidence with its motion papers: i) an affidavit, dated September 9, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 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 2, 2013; (iii) an affidavit, dated September 11, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) a copy of the April 2, 2013 notice of determination with the associated mailing cover sheet; and (v) petitioner's resident income tax return for the year 2011, dated October 15, 2012.

12. The affidavits of Daniel A. Maney and Mary Ellen Nagengast set forth the Division's general practice and procedure for processing statutory notices. Mr. Maney has been a manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the CARTS Control Unit, since January 2010. Ms. Nagengast has been the director of MAPS since October 2005, which is responsible for the receipt and storage of CMRs. Ms. Nagengast is familiar with CARTS. Both Mr. Maney and Ms. Nagengast are familiar with the Division's past and present office procedures as they relate to statutory notices.

13. 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 "4/2/13." In addition, generally all pages of the CMR are banded together when the documents are delivered into 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.

14. 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."

15. The CMR in the present matter consists of 316 pages and lists 3,475 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 316, which contains 10 entries. Ms. Nagengast 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 2, 2013 to each page of the CMR, wrote 3,475 on page 316 next to the heading "Total Pieces Received at Post Office" and

initialed or signed page 316. Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 3,475.

16. Page 179 of the CMR indicates that two notices of determination with certified control numbers 7104 1002 9730 1528 3975 and 7104 1002 9730 1528 3982 and reference number L-039186510 and L-039186567, respectively, were mailed to petitioner at the Fresh Meadows, New York, address listed on the subject notices of determination. The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

17. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier 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 listed on the CMR 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 CMR, indicating receipt by the post office. Here, as noted, the USPS employee initialed page 316 and affixed a postmark dated April 2, 2013 to each page of the CMR. 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. Here, the USPS

employee complied with this request by handwriting the number “3,475” on the last page next to the heading “Total Pieces Received at Post Office.”

18. According to the Peltier affidavit, copies of the notices at issue were mailed to petitioner on April 2, 2013, as claimed.

19. The affidavit of Heidi Corina describes the Division’s request to the USPS for delivery information on the subject notices of determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the articles of mail bearing certified control numbers 7104 1002 9730 1528 3975 and 7104 1002 9730 1528 3982. The USPS response to the request for the article bearing certified control number 7104 1002 9730 1528 3975 indicates that such article was delivered to an address in Fresh Meadows, New York, on April 6, 2013, identifies the recipient as “Chin William” and bears a copy of his signature in that capacity. The USPS response to the request for the article bearing certified control number 7104 1002 9730 1528 3982 indicates delivery of the same article on May 15, 2013 to an address of “Queens District Office” in Kew Gardens, New York, and identifies the recipient as “Department of Taxation and Finance.”

THE ORDER AND DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In both the July 10, 2014 order and the January 8, 2015 determination, the Administrative Law Judge first noted that the motion brought by the Division in each instance, i.e., a motion to dismiss or, in the alternative, a motion for summary determination, was properly treated as a motion for summary determination. The Administrative Law Judge then reviewed the standards for the granting of such motions.

Next, in both the order and the determination, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The

Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

In the July 10, 2014 order, the Administrative Law Judge found that, while the Division had established its standard mailing procedure through affidavits submitted by Mr. Maney and Mr. Peltier, it had failed to prove that such standard procedure had been followed in issuing the subject notices. This was because the Division submitted only three pages of the 316-page CMR in support of its April 1, 2014 motion.

The Administrative Law Judge noted that this flaw in the Division's proof could be overcome by other evidence of mailing in the record and further determined that the Division had provided the necessary evidence of such mailing with respect to notice number L-039186510. Specifically, the Administrative Law Judge found that the Corina affidavit and the accompanying USPS delivery information established that a copy of this notice was delivered to petitioner on April 6, 2013. The Administrative Law Judge concluded that, under such circumstances, the 90-day period for filing a petition or request for conciliation conference with respect to notice number L-039186510 began on the that date. As petitioner's request for conciliation conference was not filed until September 20, 2013, such request was late-filed. Accordingly, the Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioner's protest of notice number L-039186510. The Administrative Law Judge also found that the Corina affidavit and the accompanying USPS delivery information were insufficient to establish delivery of notice number L-039186567.

By the July 10, 2014 order, the Administrative Law Judge thus granted the Division's motion with respect to L-039186510 and denied the motion with respect to L-039186567 without prejudice to renewal.

In the January 8, 2015 determination that addressed the timeliness of the request for conciliation conference with respect to L-039186567, the Administrative Law Judge concluded that the Division had established its standard mailing procedure through affidavits submitted by Ms. Nagengast and Mr. Peltier. The Administrative Law Judge also concluded that such affidavits, along with the properly completed CMR, established that such procedure was followed in this instance. The Administrative Law Judge thus determined that notice L-039186567 was properly issued to petitioner on April 2, 2013, as claimed, and that petitioner's request for conciliation conference, filed on September 26, 2013, was untimely. Accordingly, the Administrative Law Judge granted the Division's September 12, 2014 motion and denied the petition herein with respect to notice L-039186567.

ARGUMENTS ON EXCEPTION

Petitioner raises no specific argument on exception relevant to the jurisdictional issue presented. He did seek to submit documents with his exception that were not submitted below and that do not pertain to the issue herein. By letter dated March 30, 2015, the Secretary to the Tax Appeals Tribunal advised petitioner that such documents would not be considered in the rendering of the decision in this matter.

The Division relies on the determination of the Administrative Law Judge.

OPINION

We first note that the Administrative Law Judge properly treated the Division's motions as summary determination motions. As the Administrative Law Judge noted, this is because the Division of Tax Appeals has jurisdiction over the timely filed petition herein.

Pursuant to our Rules, a motion for summary determination is properly 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]).

As we previously noted in *Matter of United Water New York* (Tax Appeals Tribunal, April 1, 2004):

“Inasmuch 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 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, 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 [1989]).”

Petitioner did not respond to either of the Division's motions for summary determination and thus has presented no evidence to contest the facts as alleged in the affidavits submitted therewith. Accordingly, such facts may be deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a request for conciliation conference following the issuance of a notice of determination (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]; 20 NYCRR 4000.5 [c] [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition where the preceding request for conciliation

conference is filed beyond the 90-day time limit (*see e.g. Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

It is well established that 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 date and fact of issuance of the relevant statutory notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011).

If the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of such notice or conciliation order (*see Matter of Katz*). The Division may meet its burden "by establishing the use of a standard mailing procedure for conciliation orders [or notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order [or notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

With respect to the Division's April 1, 2013 motion, we agree with the Administrative Law Judge's conclusion, as stated in the order, that the Maney and Peltier affidavits establish the Division's standard mailing procedure. We also agree with the Administrative Law Judge's conclusion that the submission of a partial CMR is insufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

Such an inadequacy in the evidence submitted may be overcome by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). We agree with the Administrative Law Judge's conclusion, as stated in the order, that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response thereto, that notice number L-039186510 was delivered to petitioner's last known address, as claimed, on April 6, 2013 (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

Under such circumstances, the 90-day period for filing a petition or request for conciliation conference commences with the date of delivery of the statutory notice (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011). Petitioner's request for conciliation conference was filed September 26, 2013, more than 90 days from the April 6, 2013 date of delivery of notice number L-039186510. Petitioner's request was therefore untimely filed (see Tax Law § 1138 [a] [1]; § 170 [3-a] [b]) and the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest for notice number L-039186510 (*see Matter of Modica*).

Turning to the January 8, 2015 determination, we agree with the Administrative Law Judge's conclusion that the proof submitted with the September 12, 2014 motion is sufficient to establish the mailing of notice L-039186567 to petitioner's last known address on April 2, 2013. Specifically, the affidavits submitted by the Division in connection with this motion establish the Division's standard mailing procedure and the affidavits, along with the entire properly completed CMR, establish that such procedure was followed in connection with the mailing of notice L-039186567 (*see Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011).

Such proper mailing gives rise to a presumption that “the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*Matter of Katz; see also Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). Here, petitioner did not respond to either of the Division’s motions and thus offered no evidence to rebut this presumption. Indeed, petitioner did not raise the issue of nonreceipt either in his petition or on exception. Under such circumstances, the USPS delivery information regarding notice number L-039186567 (*see* finding of fact 19) is insufficient to show that such notice was not at least offered for delivery by the USPS.

We thus concur in the Administrative Law Judge’s conclusion that the Division properly mailed notice L-039186567 to petitioner on April 2, 2013 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]). Petitioner’s request for conciliation conference, filed on September 26, 2013, was therefore untimely and properly dismissed by BCMS. As noted previously, under such circumstances, the Division of Tax Appeals has no authority to consider the merits of the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William Chin is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The order of the Administrative Law Judge is affirmed; and

3. The petition of William Chin is denied.

DATED: Albany, New York
December 3, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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