

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

GEORGE MANTHAS :

DECISION
DTA NO. 827369

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 December 1, 2009 through February 28, 2011. :

Petitioner, George Manthas, filed an exception to the determination of the Administrative Law Judge issued on June 23, 2016. Petitioner appeared by Buxbaum Sales Tax Accounting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply letter brief. Petitioner's request for oral argument was denied. Petitioner's reply letter brief was received on December 20, 2016, which date began the six-month period for the issuance of this decision.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 14, 20, 21, 22 and 23, which we have modified to more accurately reflect the record. The findings of fact and modified findings of fact are set forth below:

1. This matter concerns a sales tax audit of the Bread Factory, Inc. (the corporation), which was subject to audit for the period December 1, 2009 through February 28, 2011. Following the audit of the corporation, petitioner, George Manthas, was assessed sales and use taxes of \$43,225.92 plus penalty and interest as a responsible officer or responsible person of the corporation.

2. The corporation filed a request for conciliation conference regarding the notice of determination that had been issued to it and, in response, the Bureau of Conciliation and Mediation Services (BCMS) mailed a letter to petitioner, dated May 15, 2013, that stated that since the corporation filed a request for a conciliation conference in response to a notice of determination issued to it, the notice of determination issued to petitioner as a responsible person of the corporation, L-039091245, was considered to be protested and, as a result, a conciliation conference would be scheduled.

3. On November 15, 2013, BCMS issued a conciliation order to petitioner stating that petitioner did not appear at the September 24, 2013 conciliation conference. The order stated that notice of the conciliation conference was mailed to petitioner on August 20, 2013. Based upon the determination reached in the corporation's BCMS conference, notice of determination L-039091245 was sustained and the matter was dismissed.

4. Petitioner filed a petition dated December 4, 2015 with the Division of Tax Appeals by United Parcel Service Ground (UPS). The UPS shipping label on the envelope containing the petition is dated December 4, 2015. The petition was received by the Division of Tax Appeals on December 7, 2015.

5. On January 15, 2016, then Supervising Administrative Law Judge Daniel Ranalli issued to petitioner a notice of intent to dismiss petition with respect to the aforementioned petition.

The notice of intent provides, in pertinent part, that:

“It appears that the conciliation order under protest in this matter, CMS No. 257539, was issued to petitioner on November 15, 2013. However, the petition in this matter was not filed with the Division of Tax Appeals until December 4, 2015, or seven hundred and forty-nine (749) days later.”

6. To show proof of proper mailing of the conciliation order dated November 15, 2013, the Division of Taxation (Division) submitted, among other documents: (i) the affidavit of Michael Hall, a law clerk employed in the Office of Counsel of the Division, dated March 8, 2016; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated February 26, 2016; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked November 15, 2013; (iv) a copy of the conciliation order, cover letter and cover sheet, dated November 15, 2013, as well as a copy of the three-windowed mailing envelope used to mail the order; (v) an affidavit, dated February 29, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division’s mail room; (vi) petitioner’s 2012 New York State personal income tax return, showing petitioner’s mailing and physical address in Rocky Point, New York; and (vii) a copy of notice of determination L-039091245.

7. The affidavit of Robert Farrelly sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

8. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing,

and forwards both to the conciliation conferee for signature, who in turn forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of his or her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers' representatives with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The "Total Pieces and Amounts" is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, "11/15/13" is written in the upper right corner of pages 1 through 14 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of November 15, 2013.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, is picked up in BCMS by an employee of the Division's mail room. The Division's mail room employee delivers the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the 14-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on November 15, 2013. This CMR originally listed 147 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the names and addresses of the addressees.

16. Information regarding the conciliation order issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0099 3193 is reference or CMS number 000257539, along with petitioner's name and a Rocky Point, New York, address that is identical to the address on petitioner's electronically filed 2012 New York state personal income tax return, filed on April 13, 2013, which was the last return filed by petitioner with the Division prior to the issuance of the conciliation order.

17. The cover sheet bearing petitioner's name and the Rocky Point, New York, address appearing on petitioner's electronically filed 2012 New York state personal income tax return and on the CMR shows the same certified control number as that listed on the CMR for

petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

18. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of conciliation orders being mailed, so as to allow for correction and issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

19. The CMR in this case reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office. The specific pulled items appear on pages one and three, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner. The preprinted number "147," as appearing next to the heading "Total Pieces and Amounts," on the last page of the CMR was crossed out and replaced with the handwritten number "145" to reflect the 2 pieces pulled from the run.

20. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the mail room, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter,

a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated November 15, 2013 to, and also wrote his or her signature or initials on, each page of the 14-page CMR. The Division's mail room further requests that the USPS employees 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 November 15, 2013 CMR indicates that the USPS employee complied with this request by circling the written number "145" corresponding to the heading "Total Pieces and Amounts" to indicate the number received.

22. Mr. Peltier's affidavit states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's mail room, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on November 15, 2013, an employee of the Division's mail room delivered an item of certified mail addressed to petitioner at his Rocky Point, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 15, 2013 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular

procedures followed by the Division's mail room in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner.

24. In his response to the notice of intent to dismiss petition, petitioner submitted an affidavit dated April 1, 2016. Petitioner avers that his last known address was not the address on his 2012 personal income tax return but a New York, New York, address listed on a closing statement resulting from an August 15, 2013 real estate purchase. Petitioner further avers that the address appearing on his 2012 return was not his last known address and that his tax preparer mistakenly used that address. Petitioner acknowledges that the Rocky Point address is his home address but not his mailing address. Along with the closing statement, petitioner submitted a copy of a New York City real property transfer tax return upon which the same New York, New York, address appears.

25. Petitioner also submitted a responsible person questionnaire dated June 22, 2011 and signed by the former representative for the corporation. The questionnaire indicates that petitioner was the responsible person of the corporation and gives the same New York, New York, address for petitioner. According to petitioner, a copy of this questionnaire was communicated to the conciliation conferee by the corporation's former representative during the conciliation conference.

26. Petitioner has not challenged the issuance of notice of determination L-039091245 or denied receipt thereof.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions, noting the 90-day statutory period in which a taxpayer may file a petition protesting

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

The Administrative Law Judge concluded that the Division met the foregoing standards and established that the subject conciliation order was properly mailed to petitioner on November 15, 2013. He found that the Division correctly relied on the address listed on petitioner's last filing with the Division, his 2012 New York personal income tax return. The Administrative Law Judge rejected petitioner's argument that the Division was informed of petitioner's change of mailing address with petitioner's subsequent filing of a New York City real property transfer tax return. He noted that the petition in this matter was filed with the Division of Tax Appeals over two years after the date of the issuance of the conciliation order and thus concluded that such petition was untimely filed. Consequently, the Administrative Law Judge determined that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioner's protest and dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Division did not send the conciliation order to his last known address. He alleges that the Division has not borne its burden of showing that the conciliation order was sent to his last known address. He further urges this Tribunal to accept his New York City Finance real property transfer tax return and the responsible person questionnaire as notice of his change of his last known address. In any case, he argues that the Division failed to conduct a reasonable search of its records indicating his change of last known address.

The Division argues that the determination of the Administrative Law Judge was in all respects correct and should be affirmed. It argues that neither the New York City Finance real property transfer tax return nor the responsible person questionnaire sufficed to inform the Division of a change of petitioner's mailing address. It argues that it properly sent the conciliation order here at issue to petitioner's last known address, which is the address listed on petitioner's 2012 New York State personal income tax return. It urges this Tribunal to accept that address as petitioner's last known address.

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The notice of intent to dismiss petition stated that the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of 90 days following the issuance of a conciliation order (*see* Tax Law § 170 [3-1] [e]). We note that the standard of review for a notice of intent to dismiss petition is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

Our rules provide 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" (20 NYCRR 3000.9 [b] [1]).

As we previously noted in *Matter of United Water New York*:

"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])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

Where 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 mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

Under Tax Law § 1138, a notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of tax at his or her last known address (Tax Law § 1138 [a] [1]). Tax Law § 1131 includes corporate officers in the definition of persons liable for the collection or payment of tax (Tax Law § 1131 [1]). Any notice imposing additional sales and use tax may be mailed to the intended recipient at the last address given in the last return filed pursuant to Article 28, in any application made or to such address as may be obtainable (Tax Law § 1147 [a] [1]). Thus, the Division bears the burden of

showing that the statutory notice was sent to petitioner's last known address as part of its proof that it followed its own mailing procedures in this case.

The courts, in interpreting provisions of the Internal Revenue Code analogous to those at issue herein, have defined "last known address" as the taxpayer's last permanent address or legal residence known by the Internal Revenue Service (IRS) or the last known temporary address of a definite duration to which the taxpayer has directed the IRS to send all communications (*see Alta Sierra Vista, Inc. v Commissioner of Internal Revenue*, 62 TC 367, 374 [1974], *aff'd* 538 F2d 334 [9th Cir. 1976]). Generally, the last known address will be the address listed on the taxpayer's last tax return, unless there is "clear and concise notification" by the taxpayer of a change of address (*id.*, *see also Weinroth v Commissioner of Internal Revenue*, 74 TC 430, 435 [1980]). This definition accords with our previous decisions regarding proper mailing to a taxpayer's last known address (*see Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003).

We agree with the Administrative Law Judge that petitioner's last known address as of November 15, 2013, the date that the BCMS conciliation order was issued, was petitioner's Rocky Point address listed on his 2012 New York personal income tax return. We disagree with petitioner that either his responsible person questionnaire or his New York City Finance real property transfer tax return provided clear and concise notification to the Division of a change of address.

We do not think that the address provided on the responsible person questionnaire clearly and concisely notified the Division of petitioner's change of address. In any case, petitioner's 2012 New York personal income tax return, filed on April 13, 2013, superceded the last address known by the Division from the responsible person questionnaire, which was dated June 22,

2011. Tax Law § 1147 requires issuance of a notice of determination under Article 28 to the “person for whom it is intended in a postpaid envelope addressed to such person 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* [emphasis added]” (Tax Law § 1147 [a] [1]). The record does not show any return filed pursuant to Article 28 or other application made by the petitioner to the Division in the time period following petitioner’s filing of his personal income tax return and prior to the issuance of the notice here at issue. Thus, in the absence of a last address given in a return pursuant to Article 28 or some other application the petitioner made, the Division was required to mail the notice of determination to petitioner at such address as was obtainable at that time (*see Matter of Nelloquet Rest., Inc.*, Tax Appeals Tribunal, March 14, 1996). Because the Division was put on notice of petitioner’s Rocky Point address through his filing of his personal income tax return on April 13, 2013, that address became petitioner’s last known address for purposes of Tax Law § 1138.

Petitioner asserts on exception that the Division provided no evidence that the 2012 New York personal income tax return was filed on April 13, 2013. We agree with the Division that petitioner himself conceded that fact in his affidavit, in which he claims that his tax preparer used the wrong address on the return filed on April 13, 2013. Petitioner alleges in his affidavit in opposition to the notice of intent to dismiss petition that the Rocky Point address was his permanent home address as of April 13, 2013 even if he did not intend it to be listed as his mailing address. Where, as here, there has been a recent filing of a personal income tax return by a person responsible for the collection and paying over of sales and use tax, it seems clear that such address was “obtainable” in the context of Tax Law § 1147 (*id.*).

We reject petitioner's assertion that his New York City Finance real property transfer tax form provided clear and concise notification of a change in address to the Division. As noted by the Administrative Law Judge and argued by the Division, New York City Finance is an agency separate and distinct from the Division and information shared with one agency in a filing or application cannot be reasonably imputed to another. As petitioner has not shown that he provided a clear and concise notification of a change of address directly to the Division, we agree with the Division that petitioner's last known address was his permanent home address listed on his 2012 personal income tax return.

We also agree that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

We also find that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Specifically, this document lists certified control numbers and reference numbers with corresponding names and addresses and bears USPS postmarks dated November 15, 2013, on each page. As noted, the name, address, reference and the certified control number of petitioner appears on page five of the CMR. There are 145 pieces of mail listed on the CMR and a postal employee circled a handwritten "145" on page 14 of the CMR, indicating the total number of pieces of certified mail received, and initialed the CMR to indicate receipt by the post office of all 145 pieces of mail listed thereon in accordance with the Division's standard mailing procedure. We thus conclude that the Division has presented sufficient documentary proof to establish that a copy of the conciliation order here at issue was mailed as addressed to petitioner at his last known address on November 15, 2013.

A petition must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the 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). As the petition herein was not filed until December 4, 2015, which was beyond the 90-day period provided for under Tax Law § 170 (3-a) (e), 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 George Manthas is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of George Manthas is dismissed, with prejudice.

DATED: Albany, New York
June 1, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner