

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MIGUEL URREGO : DECISION
 : DTA NO. 827558
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2011 through August 31, 2012. :

Petitioner, Miguel Urrego, filed an exception to the determination of the Administrative Law Judge issued on August 3, 2017. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner's request for oral argument was denied. The six-month period for the issuance of this decision began on January 29, 2018, the date that petitioner's letter reply brief was received.

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

ISSUE

Whether the petition should be dismissed because it was not timely filed following the issuance of notices of determination and estimated determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have

modified finding of fact 3, 13 and 15. We have also added a new finding of fact, numbered 18 herein. We make these changes to more fully reflect the record. As so modified, the Administrative Law Judge's findings of fact appear below.

1. On March 25, 2016, petitioner, Miguel Urrego, filed a petition with the Division of Tax Appeals in protest of the following notices of estimated determination issued by the Division of Taxation (Division) pursuant to Articles 28 and 29 of the Tax Law:

Notice Number	Tax Period Ended	Tax	Penalty	Interest	Balance Due
L-041123666	8/31/12	\$9,662.19	\$2,898.61	\$2,670.64	\$15,231.44
L-041123667	5/31/12	\$34,649.76	\$10,741.27	\$11,231.51	\$56,622.54
L-041123668	2/29/12	\$55,739.52	\$17,279.14	\$20,796.00	\$93,814.66
L-041123669	11/30/11	\$101,425.71	\$31,441.82	\$43,029.68	\$175,897.21

The petition also protested the following notices of determination issued pursuant to Articles 28 and 29 of the Tax Law:

Notice Number	Tax Period Ended	Tax	Penalty	Interest	Balance Due
L-041123670	8/31/11	\$9,662.21	\$3,043.48	\$4,664.04	\$17,369.73
L-041123671	5/31/11	\$33,649.77	\$10,589.76	\$17,938.51	\$62,178.04

Each of the above notices was dated May 1, 2014. The Division maintains that the notices were issued electronically pursuant to Tax Law § 35.

2. The subject notices were issued to petitioner as a responsible person for a company named Chef & Company, LLC, for the periods at issue.

3. The Division brought a motion on February 21, 2017, to dismiss the petition or, in the alternative, for summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In support of its

motion and to prove the issuance of the notices under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated February 21, 2017, of Adam Roberts, Esq.; (ii) an affidavit, dated February 21, 2017, of Monica Amell, Taxpayer Services Specialist 3 and Team Lead of the External Communication Unit of the Division; (iii) a copy of the Division's online services (OLS) account terms and conditions for individuals; (iv) a screenshot of petitioner's OLS account summary to "Manage Email"; (v) a screenshot of petitioner's OLS "View Online Services Account"; (vi) correspondence, dated September 20, 2011, from the Division to petitioner confirming petitioner's creation of an OLS account; (vii) a screenshot of petitioner's OLS account "OTC tpid results" user ID history; (viii) the subject notices of estimated determination and notices of determination all dated May 1, 2014; (ix) a copy of petitioner's "Event Management Transaction Log" within the e-manages process for an integrated revenue enterprise (e-MPIRE); (x) a screenshot of petitioner's OLS account summary; (xi) the Division's printout of "Delivery Details by Template ID"; and (xii) the Division's printout of electronic message delivery status.

4. The affidavit of Monica Amell sets forth the Division's general practice and procedure for the processing and delivery of taxpayer-specific electronic communications, including electronic statutory notices. Ms. Amell has been Team Lead of the External Communication Unit of the Division since June 2013. As part of Ms. Amell's duties, she manages the processing and delivery of taxpayer-specific electronic communications and the monitoring of reports to determine the electronic status of email alerts referring to statutory notices. Taxpayers may open an OLS account and request electronic communication of their tax-related documents from the Division. The OLS system allows a taxpayer to authorize the Division to send an email alert to

his or her chosen external email address advising the taxpayer to check his or her OLS account for any message in the message center section. The message center is a secure section within OLS where a taxpayer can view electronic correspondence from the Division. Taxpayers can choose which email service they would like to receive through OLS by clicking on check boxes in the “manage email” section of their OLS account, with options including emails for bills and related notices and other notifications. The Division acknowledges when an online account has been created by sending correspondence to the taxpayer confirming the taxpayer’s creation of an OLS account.

5. The Division’s OLS account terms and conditions for individuals provides that in consideration of a taxpayer’s use of an OLS account, the taxpayer agrees that by providing electronic communication authorization, the taxpayer agrees to receive the indicated tax-related documents and communications electronically and agrees that the Division will not use physical (postal) mail to provide the communications. The Division instead sends an email that alerts the taxpayer to sign on to his or her OLS account to access the information. The taxpayer further agrees to provide an updated email address and periodically check for new account activity.

6. In the “manage email” section of an OLS account, an account holder must affirmatively opt-in to receiving tax bills and related statutory notices via electronic communication by checking a box labeled “Bills and Related Notices - Get emails about your bills.” The account holder must then click on the “Save” button to register and record the account holder’s authorization to receive the same electronically. Immediately above the save button is an acknowledgment section, which provides:

“By selecting one or more of the choices above and clicking **Save**:

- I agree to receive tax bills and similar account notices electronically at

- my online services account.
- I understand that I will no longer receive these communications via physical (postal) mail.
- I understand that my right to challenge bills received through my online services account is the same as that for paper bills.”

7. Petitioner opened an OLS account with the Division on September 16, 2011 under his name, taxpayer identification number, and user identification number, using a Logon ID of “Mu**ego8” and an email address of “miguel@***.com.” Petitioner’s OLS account for this user identification number and email address remains active to date.¹

8. In the “manage email” section of petitioner’s OLS account described in finding of fact 6, petitioner checked the boxes labeled “Bills and Related Notices - Get emails about your bills” and “Other Notifications - Get emails about refunds, filings, payments, account adjustments, etc.”

9. On September 20, 2011, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account on September 16, 2011 under the username of “mu**ego8.”

10. The Division’s advanced function presentation (AFP) system initiates billing printouts. The AFP system uses the Division’s DZ4010Z retrieve view data (RVD) program. The RVD program verifies email eligibility based on the internal taxpayer ID, tax type and billing form. The RVD program uses internal taxpayer ID, user ID, email address, and email eligibility to determine authorization to receive electronic communications through OLS.

11. When a statutory notice is scheduled to be issued to a taxpayer under this procedure, the AFP system generates a mail file of the electronic statutory notices. The AFP system stores the file of the electronic statutory notices and the verified email address from the RVD program

¹ The user identification and email address are partially redacted to preserve confidentiality.

until the issuing date is reached. On the issuing date, email alerts are sent to the external email address associated with the recipient's OLS account and the message is displayed in the OLS message center. The email alerts are delivered through a third-party vendor, GOVDelivery. GOVDelivery provides the Division delivery status information that the Division stores and reports advising of every email sent on behalf of the Division, with a status of "D" for delivered or "U" for undelivered.

12. The statutory notice is stored in a message file until the issuing date. On the issuing date, the notice is posted on a secure database for viewing by the taxpayers in their message center upon logging in to the OLS. The statutory notice is viewable in the message center section of the taxpayer's OLS account.

13. On May 1, 2014, the Division posted six messages stating, "You have a new liability due" to petitioner's OLS account and sent corresponding email alerts to petitioner's email address of miguel@***.com. A screenshot of petitioner's OLS account summary indicating the posting of these messages is in the record. Also on May 1, 2014, the Division posted notices of estimated determination numbers L-041123666 through L-041123669 and notices of determination numbers L-041123670 and L-041123671 to petitioner's OLS account, which were stored in his OLS message center.

14. The Division maintains delivery status information of email alerts in the delivery details by template ID (delivery details). The delivery details relevant to the present case indicate that the Division sent email alerts to petitioner at his email address of miguel@***.com on May 1, 2014, with APL Tracking IDs MG050120149688486, MG050120149688498, MG050120149688501, MG050120149688502, MG050120149688504, and

MG050120149688505. The delivery details indicate the status of the emails sent to petitioner on May 1, 2014 as “D” (delivered).

15. The record contains a printout of the status of messages sent to petitioner’s OLS account and email address. The status information reports a status of “R” for read and “U” for unread. The status printout relevant to the May 1, 2014 messages sent to petitioner indicates that messages APL tracking IDs MG050120149688486, MG050120149688498, MG050120149688501, MG050120149688502, MG050120149688504, and MG050120149688505 delivered to petitioner’s OLS account and email address had a status of “U” or unread.

16. Ms. Amell avers that the procedures followed and described in her affidavits were the normal and regular procedures of the Division’s External Communication Unit on May 1, 2014.

17. In response to the Division’s motion, petitioner, in an unsworn letter, denied receipt of the subject notices and alleged that the Division failed to meet its burden of proving that it emailed the alerts concerning the notices of determination and estimated determination to petitioner’s last known email address. Petitioner did not argue that he changed his email address or updated his account from the time it was opened until the date the notices were alleged to have been issued.

18. The issue of the timeliness of the petition in this matter was previously the subject of a notice of intent to dismiss petition issued by the Division of Tax Appeals on May 4, 2016. In response to the notice of intent, the Division submitted evidence pertaining to petitioner’s creation of an OLS account and the Division’s use of email and petitioner’s OLS account to notify petitioner of the six statutory notices under protest. In an order dated October 6, 2016, the

Administrative Law Judge found that the Division failed to provide a copy of the terms and conditions as agreed to by petitioner in establishing his OLS account in 2011. The Administrative Law Judge thus determined that the Division failed to prove that petitioner authorized the use of electronic communication for statutory notices and ordered the withdrawal of the notice of intent. The evidence submitted by the parties in connection with the notice of intent to dismiss petition is part of the record in this matter. Such evidence includes an affidavit of Ms. Amell, dated July 12, 2016, together with exhibits attached thereto.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge noted that the Division bears the burden of proving that it properly issued a protested notice to the taxpayer. The Administrative Law Judge observed that, where a statutory notice is physically mailed, the Division can meet its burden by establishing that it had a standard mailing procedure and that the procedure was followed in a specific case. The Administrative Law Judge noted that, when properly authorized, the Division may provide a statutory notice to a taxpayer using an electronic means of communication. The Administrative Law Judge determined that the Division was authorized to send notices to petitioner electronically. The Administrative Law Judge also determined that the Division established that it had a standard procedure for the furnishing of statutory notices by electronic means and that such procedure was followed with respect to the notices at issue. The Administrative Law Judge thus granted the Division's motion for summary determination and dismissed petitioner's petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner notes that the record does not include petitioner's tax returns and asserts that the

Division thus failed to establish his last known mailing address. Petitioner contends that the electronic transmittal of the subject notices does not prove that such notices bear his last known mailing address as required. Petitioner also contends that the Division failed to follow its standard of mailing and that the Division failed to prove that it mailed the notices to petitioner's last known mailing address. Petitioner also denies receipt of the notices by either email or regular mail.

Petitioner also argues on exception, as he did in his petition, that the assertion of responsible officer liability against petitioner herein is inconsistent with the Division's policy of asserting liability against minority interest responsible officers of a limited liability company on a pro rata basis.

The Division contends that it followed its own established procedures and thus properly issued the subject notices of estimated determination and notices of determination to petitioner by electronic means. The Division contends that petitioner's claim that he did not receive the notices is insufficient to rebut the presumption of receipt that arises when the Division follows its procedures in issuing a notice.

The Division also contends that petitioner's tax returns and his last known mailing address are not relevant in the present matter because the subject notices were not physically mailed.

OPINION

The present matter came before the Administrative Law Judge as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). 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]).”

The standard of review on a motion to dismiss is the same as that for a summary determination motion (*Matter of Nwankpa*, Tax Appeals Tribunal, October 27, 2016).

Generally, a taxpayer may protest a notice of determination or estimated 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 (Tax Law § 1138 [a] [1]). A taxpayer also has the option of commencing an administrative challenge to such a notice by filing a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS) “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one-day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (*see e.g. Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

As the Administrative Law Judge correctly noted, 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 fact and date 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 Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011).

The foregoing evidentiary standards are premised on statutes requiring that a notice of deficiency or determination be mailed in order to be properly issued (*e.g.* Tax Law § 1138 [a]

[1]). In the present matter, however, the subject notices were issued electronically. The furnishing of notices by such means of communication is authorized by Tax Law § 35, which provides:

“Notwithstanding any other provision of New York state law, where the department has obtained authorization of an online services account holder, in such form as may be prescribed by the commissioner, the department may use electronic means of communication to furnish any document it is required to mail per law or regulation. If the department furnishes such document in accordance with this section, department records of such transaction shall constitute appropriate and sufficient proof of delivery thereof and be admissible in any action or proceeding.”²

Although the means by which notices of determination are properly issued differs under Tax Law §§ 35 and 1138 (a) (1), we find that the Division’s burden to show that it had a standard procedure for issuing notices and that such procedure was followed in a particular instance remains (*Matter of Perez*, Tax Appeals Tribunal, November 12, 2015). More specifically, where a statutory notice is issued under Tax Law § 35, we agree with the Administrative Law Judge that the Division must establish its standard procedures for establishing OLS accounts, obtaining authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders (*id.*). The Division must also show that such procedures were followed in the particular instance (*id.*).

Turning to the specific facts presented here, we agree with the Administrative Law Judge that the Division has proven, through the affidavit of Monica Amell and the documentary evidence attached thereto, its standard procedures for establishing OLS accounts, obtaining

² There are two sections 35 of the Tax Law. The section relevant here is titled “Use of electronic means of communication.” The other section 35 contains provisions for the economic transformation and facility redevelopment program tax credit and is not relevant here.

authorization from OLS account holders for electronic communications, and sending notices electronically to OLS account holders.

We also agree with the Administrative Law Judge that the Division has established through the affidavit and documentary evidence that the standard procedures were followed in this particular instance.

Specifically, the evidence shows that petitioner opened an OLS account on September 16, 2011 under his name, taxpayer identification number, and user identification number, using a logon ID name of “Mu**ego8” and an email address of miguel@***.com. On September 20, 2011, the Division sent an acknowledgment to petitioner, confirming his creation of the OLS account under the username of “mu**ego8.”

The evidence also establishes that petitioner authorized the Division to send notices electronically by checking the relevant boxes in the “manage email” section of his OLS account, thereby indicating his agreement to receive email regarding bills, notices and other notifications. Pursuant to the Division’s OLS account terms and conditions for individuals, by providing such electronic communication authorization, the taxpayer agrees to receive the indicated documents and communications electronically and agrees that the Division will not use postal mail to provide these communications.

The Division has also offered proof sufficient to establish that the statutory notices were furnished to petitioner by means of electronic communication on May 1, 2014 to his OLS account with alerts sent to his last known email address. The Division’s records show that six email alerts were sent to petitioner’s email address and the four notices of estimated determination and the two notices of determination at issue were posted to petitioner’s OLS

account and stored in his OLS message center on May 1, 2014. The email alerts sent to petitioner's email address advised him that "you have a new liability due," thereby alerting him to view the statutory notices posted in the message center of his OLS account. The Division's records further show the delivery status of the May 1, 2014 emails as "D" (delivered).

Based on the foregoing, we conclude, as did the Administrative Law Judge, that the Division has presented sufficient evidence to establish that it furnished the subject notices of estimated determination and notices of determination on May 1, 2014 using an electronic means of communication pursuant to Tax Law § 35, and that the records presented constitute appropriate and sufficient proof of delivery thereof. We further conclude that such proper issuance of the subject notices pursuant to Tax Law § 35 is presumptive evidence of the receipt of such notices by petitioner (*cf.* Tax Law § 1147 [a] [1] [physical mailing of notice is presumptive evidence of receipt]). Accordingly, similar to a physical mailing situation, we find that petitioner's mere denial of receipt of the notices is not sufficient to overcome this presumption (*see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]).

Having determined that the Division properly provided the notices by means of electronic communication on May 1, 2014 pursuant to Tax Law § 35, 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]).

The petition in this matter was filed on March 25, 2016. This date falls well after the 90-day period of limitations for such a filing. The petition was thus untimely and properly dismissed by the Administrative Law Judge.

Petitioner's arguments regarding whether the Division established that the physical address on the statutory notices was correct or whether the Division established that it physically mailed the notices to petitioner's last known address are irrelevant, given petitioner's agreement to the use of electronic means of communication to provide him with notice of such determinations.

As noted previously, the Division of Tax Appeals has no jurisdiction to consider the merits of a late-filed petition (*Matter of Garitta*). Accordingly, we may not address petitioner's argument that the Division improperly failed to assert responsible officer liability against him, a claimed minority interest owner of a limited liability company, on a pro rata basis (*see* NY St Dept of Taxation & Fin Technical Memorandum TSB-M-11[17]S [2011] ["New Policy Relating to Responsible Person Liability Under the Sales Tax Law"]).

While we agree with the Administrative Law Judge's conclusion that the subject petition was late-filed and therefore properly dismissed, we note that the Administrative Law Judge made a procedural error in his determination, which has no bearing on the ultimate outcome, but which we hereby correct.

The present matter came before the Administrative Law Judge as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) or, in the alternative, for summary determination pursuant to 20 NYCRR 3000.9 (b). As noted previously, the standard of review for both such motions is the same (*Matter of Nwankpa*). In dismissing the petition, the Administrative Law Judge granted the Division's motion for summary determination. As discussed above, however, the Division of Tax Appeals lacks subject matter jurisdiction over a late-filed petition (*Matter of Garitta*). The Rules of Practice and Procedure provide for the dismissal of such a petition pursuant to a motion to dismiss (20 NYCRR 3000.9 [a] [ii]). Accordingly, the Division's motion

to dismiss should have been granted, thereby rendering the motion for summary determination moot (*Matter of Liaquat Ali, Inc.* Tax Appeals Tribunal, January 22, 2015).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Miguel Urrego is denied;
 2. The determination of the Administrative Law Judge is modified to the extent that the Division's motion to dismiss the petition is granted, but the determination is otherwise affirmed;
- and

3. The petition of Miguel Urrego is dismissed.

DATED: Albany, New York
July 12, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner