

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| MOHAMMAD K. UDDIN | : | DECISION |
| for Revision of a Determination or for Refund of | : | DTA NO. 827637 |
| Sales and Use Taxes under Articles 28 and 29 of | : | |
| the Tax Law for the Period March 1, 2009 through | : | |
| February 29, 2012. | : | |

Petitioner, Mohammed K. Uddin, filed an exception to the determination of the Administrative Law Judge issued on March 16, 2017. Petitioner appeared by Arthur Morrison, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on July 5, 2017, the date petitioner's reply brief was due.

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

ISSUE

Whether petitioner filed a timely protest against the Division of Taxation's assessment of tax, penalty and interest against him.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact

2 and 11, which we have modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. Petitioner, Mohammad K. Uddin, filed a petition with the Division of Tax Appeals. The petition is dated as signed on May 4, 2016, was mailed by United States Postal Service (USPS) certified mail, and the envelope in which the petition was mailed bears a USPS postmark dated May 18, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on May 23, 2016. Petitioner lists his address on the petition as "5056 46 Street, Woodside, NY, 11377-7325." The petition specifically identifies the assessment at issue as Assessment ID # L-042864461-2, and further specifies that a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) was not requested.

2. Attached to the petition was a consolidated statement of tax liabilities, dated April 26, 2016, reflecting a sales tax liability (under the heading "Bills subject to collection action") in the amount of \$179,568.71, plus penalty and interest, against petitioner for tax periods ending February 29, 2012.¹

3. The Petition Intake Section of the Division of Tax Appeals responded to the petition by a letter dated June 22, 2016, advising petitioner that a copy of the appropriate "notice/assessment/denial" had not been provided with the petition. The letter noted that it was petitioner's responsibility to submit such document, and provided information to petitioner as to how to obtain a copy thereof to be furnished to the Division of Tax Appeals.

4. On October 4, 2016, Daniel J. Ranalli, then-Supervising Administrative Law Judge of

¹ The consolidated statement also reflects, under the heading "Bills not yet subject to collection action," a sales tax assessment bearing a different assessment ID number and pertaining to a different tax period. That assessment ID number, included as part of petitioner's protest under the petition filed herein, was assigned a different DTA number and is proceeding as a separate matter (DTA No. 827695).

the Division of Tax Appeals, responded to the petition by issuing a notice of intent to dismiss petition (notice of intent) to petitioner, petitioner's representative, and the Division of Taxation.

The notice of intent provides as follows:

“In conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the conciliation order or statutory notice being protested. Petitioner did not include the required notice of determination, and therefore the petition does not appear to have been timely filed.”

Under the notice of intent, petitioner was afforded a period of thirty days within which to file a corrected petition (i.e., provide the requisite statutory document conferring the right to a hearing), and to provide written comments on the proposed dismissal of the petition.

5. In response to the notice of intent, the Division of Taxation (Division) provided a copy of a notice of determination, addressed to petitioner and allegedly issued on May 7, 2015, bearing assessment ID L-042864461-2, and assessing sales tax due against petitioner as an officer or responsible person of Anika USA, Inc., for the period spanning June 1, 2009 through February 29, 2012 in the amount of \$179,568.71, plus penalty and interest. In order to prove proper mailing of the foregoing notice of determination to petitioner, as claimed, on May 7, 2017, the Division provided the following documents: (i) an affidavit, dated December 16, 2016 of Michael Hall; (ii) an affidavit, dated November 17, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated November 22, 2016, of Bruce Peltier, a stores and operations supervisor and a supervisor in the Division's mail room; (iv) an 11-page “Certified Record for Presort Mail - Assessments Receivable” (CMR); (v) a copy of the notice of determination dated May 7, 2015, together with its associated mailing cover sheet; and (vi) a

copy of petitioner's Form IT-201 (New York State resident income tax return) as e-filed for the year 2014 on February 26, 2015, listing petitioner's address as that set forth above, and representing petitioner's last filed return and last known address prior to the claimed date of issuance of the notice of determination at issue.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of determination such as that at issue herein, and other such notices during the period in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page mailing cover sheet (form DTF-997) generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices. The mailing cover sheet is the first sheet in the unit.

7. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and P.O. Address." Remaining columnar

headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are forwarded together to the Division's mail room. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

8. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet show through the window. The staff member then weighs, seals and affixes postage

and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business, and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on May 7, 2015, including the notice addressed to petitioner, consists of 11 cut sheet pages. Each of the pages includes, in its upper left corner, the preprinted year/day/time "run" listing of "20151201700" (*see* finding of fact 8). Appearing in the upper right corner of the CMR on pages numbered "1" and "11" is the handwritten date "5/7/15" indicating the manually inserted date of actual mailing (*see* finding of fact 8). Each of the CMR pages submitted includes a legible USPS postmark of the Colonie Center branch office of the USPS, dated May 7, 2015 and listing zip code "12205." All pages of the CMR include 11 entries for pieces of mail, with the exception of page 11 (the final page), which includes 5 entries for pieces of mail, thus resulting in a total of 115 pieces of mail listed on the CMR as originally printed.

11. In this case, the printed entry for the piece of mail listed on page eight of the CMR and bearing certified control number 7104 1002 9730 0457 0314 was assigned to the reference (i.e., assessment) number L-042864461, and was to be mailed to petitioner, Mohammed K. Uddin, at 5056 46th St., Woodside, NY 11377-7325. This information agrees with such information that appears on the notice of determination and on the cover sheet associated therewith.²

12. Appearing below the five entries on page 11 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 115, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number 115 is handwritten and circled. Appearing at the lower right area of page 11 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above and to the right of this stamped instruction reflects the aforementioned May 7, 2015 USPS postmark as well as the initials affixed by the postal clerk.

13. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and supervisor in the Division’s mail room (*see* finding of fact 5), and upon review of the CMR submitted by the Division. Each affiant avers to their personal involvement in and

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. In response to the notice of intent, petitioner contends that a complete and timely petition was filed, including a copy of the assessment. Review of the documents attached to petitioner's response reveals that the "assessment" to which petitioner refers is the consolidated statement of tax liabilities (*see* finding of fact 2), and that no other assessing document (e.g., a notice of determination), was included with the petition as filed or as part of petitioner's response to the notice of intent.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by setting forth that the Division of Tax Appeals was considering the dismissal of the petition in this matter pursuant to the Tax Appeals Tribunal Rules of Practice and Procedure (rules). The Administrative Law Judge observed that petitioner did not include with his petition a copy of the statutory document giving rise to the right to a hearing as required by the rules, and thus it is not possible to determine whether the petition was timely filed.

The Administrative Law Judge stated that the standard of review for a notice of intent to dismiss petition is the same as that employed in reviewing a motion for summary determination. The Administrative Law Judge next described the standard for granting a motion for summary determination as provided under our rules, noting that if the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

The Administrative Law Judge found that the petition as filed included a statement of consolidated tax liabilities rather than a statutory notice that gives rise to a right to a hearing, which is a threshold requirement for filing a petition in protest of a proposed assessment. The Administrative Law Judge concluded that because petitioner did not include with the petition as filed a copy of any document giving rise to a right to a hearing, provide a copy of such document at any time thereafter or make any claim regarding nonreceipt of such a statutory notice, the petition in this matter is properly subject to dismissal.

The Administrative Law Judge found that a copy of the statutory notice addressed to petitioner was provided in the Division's response to the notice of intent and observed that it appeared to have been issued on May 7, 2015. Citing to the Tax Law, the Administrative Law Judge noted that a taxpayer has 90 days from the mailing of a statutory notice to file a timely protest of the same. The Administrative Law Judge observed that the statutory time limits for filing are strictly enforced and protests filed even one day late are considered untimely.

The Administrative Law Judge next described the burden of proof as resting with the Division to show that the statutory notice was properly issued. The Division must demonstrate the fact and date of issuance of the statutory notice to carry its burden of proof of showing proper mailing of the subject notice. The Administrative Law Judge considered whether the Division had shown evidence of its standard mailing procedures and whether such procedures were followed in this instance. Considering the affidavits of Division employees involved in and having knowledge of the process of generating and issuing statutory notices, along with their supporting documents, the Administrative Law Judge concluded that the Division had borne its burden in showing the fact and date of issuance of the statutory notice at issue on May 7, 2015.

The Administrative Law Judge also noted that proper issuance of a notice of determination gives rise to a rebuttable presumption under the Tax Law that the proposed assessment was received by the taxpayer. In this case, the Administrative Law Judge observed that petitioner did not attempt to rebut the presumed receipt of the notice at issue, and thus petitioner had 90 days from the date of its issuance to timely file a protest of the proposed assessment. As the petition in this matter was not filed until May 18, 2016, or in excess of 90 days, the Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to address the merits of petitioner's protest and dismissed the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioner argues that prior to the issuance of the notice of determination, he had named a personal representative by filing a power of attorney with the Division. He argues further that this representative was never served with the notice of determination and thus the 90-day limitations period for filing a protest of the proposed assessment contained therein never began to run. As such, petitioner argues that he is entitled to a hearing on the merits of his protest. In the alternative, petitioner argues that his protest should be deemed timely by operation of Tax Law § 1138 (a) (3) (B), which considers a timely filed protest by an entity to be a timely filed protest by its responsible persons.

The Division argues that the Administrative Law Judge correctly determined the facts and properly concluded that petitioner failed to file a timely protest of the notice of determination. It claims that petitioner's argument regarding service of the notice of determination on petitioner's representative is a new factual argument brought on exception for the first time. It also notes that petitioner has not taken exception to the conclusion of the Administrative Law Judge that the

Division properly issued the statutory notice to petitioner.

OPINION

We first observe that the determination of the Administrative Law Judge followed the Division of Tax Appeals' issuance of a notice of intent to dismiss petition made pursuant to our rules (20 NYCRR 3000.9 [a] [4]). Thus, we begin with the standard of review for a dismissal following a notice of intent to dismiss petition. We agree with the Administrative Law Judge that a notice of intent to dismiss is subject to the same standard of review as that used in reviewing a motion for summary determination (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). As described by the Administrative Law Judge, 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]). Where not otherwise in conflict, such motions shall be subject to the same provisions as motions for summary judgment made pursuant to CPLR § 3212 (20 NYCRR 3000.9 [c]).

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 [2d Dept 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 [2d Dept 1989])." (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

A taxpayer is entitled to protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the issuance of such a notice (Tax Law

§§ 1138 [a]; 2006 [4]). As noted by the Administrative Law Judge, it is well established that such time limits are strictly enforced and, accordingly, protests filed even one day late are considered untimely (*Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because in the absence of a timely protest, a statutory notice, to which protest rights attach, becomes fixed and final and the Division of Tax Appeals is without jurisdiction to consider the substantive merits of a late-filed protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Where, as here, the timeliness of a taxpayer's protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. This is achieved by the Division demonstrating the fact and date of proper mailing of the statutory notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice of determination is issued when it is properly mailed via certified or registered mail, and it is properly mailed when it is delivered into the custody of the USPS properly addressed to the taxpayer at his or her last known address (Tax Law § 1138 [a] [1]). The last known address is the address given in the last sales tax return filed or in any application made to the Division, or if no return or application has been filed, to such address as the Division may obtain (Tax Law § 1147 [a] [1]). The Division can meet its burden of proving proper mailing of the statutory notice at issue by providing evidence of its standard mailing procedure and that such procedure was followed in this instance (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The Division's proper mailing of a notice of

determination gives rise to a rebuttable presumption of receipt by the taxpayer to whom the same is addressed (Tax Law § 1147 [a] [1]; *Matter of Katz*; see also *Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

We agree with the Division that the Administrative Law Judge correctly determined that it demonstrated proper mailing of the notice of determination dated May 7, 2015. The Division has provided adequate proof of its standard mailing procedure and that such procedure was followed in this instance through the affidavits of its employees, Ms. Nagengast and Mr. Peltier. The attached CMR indicates that a piece of certified mail bearing the numerical information on the notice was mailed to petitioner at the address listed on petitioner's resident income tax return filed on February 26, 2015, which was the last return filed with the Division before the date of the notice's issuance. We agree with the Administrative Law Judge that the CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the fact and date of mailing of the notice of determination (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

The proper issuance of a statutory notice starts the 90-day period in which to file a timely protest of the proposed assessment (Tax Law §§ 1138 [a] [1]; 170 [3-1] [a]). In this case, petitioner failed to offer any evidence to rebut the presumption of receipt of the statutory notice. Thus, we concur with the Administrative Law Judge that petitioner has failed to bear his burden of proof in showing that the protest in this matter was timely filed.

We next turn to petitioner's argument that his protest should be deemed timely because his purported representative was not served with a copy of the notice of determination when it

was issued. We note that the record does not contain a copy of a power of attorney naming the representative whom petitioner claims was not served with a copy of the notice. While the Tax Law does not specifically provide for service of the statutory notice on a taxpayer's representative, our prior decisions have consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Such a period of tolling is not indicated in this case, however, as petitioner has not shown that he had designated his purported representative at the time of the issuance of the statutory notice at issue.

For similar reasons, we must reject petitioner's argument that the notice of determination here at issue be deemed to have been timely protested by operation of Tax Law § 1138 (a) (3) (B). That section of the Tax Law deems a corporate entity's timely protest of a notice of determination to be a timely protest by any of its responsible persons, thus abrogating their need to file individual protests on their own behalf. However, petitioner offered no evidence of a corporate entity's timely protest in response to the notice of intent. Without more, petitioner's argument amounts to no more than an unsupported assertion and is insufficient to bear his burden of showing a material and triable issue of fact counterindicating dismissal in this case. In light of the Division's demonstration of proper mailing of the notice of determination to petitioner, we must conclude that the 90-day period for a timely protest of the notice of determination began on May 7, 2015. As the petition in this matter was not filed until May 18, 2016, we conclude that the petition was untimely and the Division of Tax Appeals lacks jurisdiction to hear the merits of petitioner's protest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mohammed Uddin is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Mohammed Uddin is dismissed.

DATED: Albany, New York
January 18, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner