

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ANGEL SARMIENTO :

DECISION
DTA NO. 828059

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 June 1, 2012 through February 28, :
2014.

Petitioner, Angel Sarmiento, filed an exception to the determination of the Administrative Law Judge issued on August 17, 2017. Petitioner appeared by Glenn H. Ripa, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Howard S. Beyer, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on June 28, 2018, in New York, New York, which date began the six-month period for issuance of this decision.

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

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Such facts appear below.

1. On February 1, 2017, petitioner, Angel Sarmiento, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a notice of determination, assessment number L-043736691, which was not attached to the petition as originally filed. After correspondence with petitioner, the notice was obtained from the Division of Taxation (Division) and thereafter provided by petitioner to the Division of Tax Appeals to be associated with the petition.

2. The subject notice of determination, dated September 29, 2015, was addressed to petitioner at 3244 99th Street, Apt. 1, East Elmhurst, New York 11369-1831.

3. On March 10, 2017, the Supervising Administrative Law Judge of the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of a notice of determination issued to petitioner on September 29, 2015, and that the petition was not filed until February 1, 2017, or 491 days later, and was thus untimely.

4. In response to the issuance of the notice of intent to dismiss petition and to prove mailing of the notice under protest, the Division submitted the following: (i) an affidavit, dated April 19, 2017, 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 September 29, 2015; (iii) an affidavit, dated April 25, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room since April 2010; (iv) an affidavit, dated April 26, 2017, of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, a position she has held since April 2005; (v) a copy of the September 29, 2015 notice with the associated mailing cover sheet addressed to petitioner; (vi) a copy of a warrant, bearing a docketed date of April 12, 2016, issued to petitioner "individually

and as a responsible person of Sabor Y Rumba Inc.,” bearing a mailing address of 6044 56th St., Apt 2R, Maspeth, New York 11378-3602, concerning assessment L-043736691 for the period ending February 28, 2014; and (vii) a copy of petitioner’s electronically filed New York resident income tax return, form IT-201, for tax year 2013, dated May 9, 2014, bearing the address of 3244 99th Street, Apt. 1, East Elmhurst, New York 11369, the same address for petitioner as that listed on the subject notice.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division’s Case and Resource Tracking System (CARTS) and the Division’s past and present procedures as they relate to statutory notices. 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 “9/29.”¹ In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain

¹ As set forth in the Nagengast affidavit, in the upper left hand corner of Page 1 of the CMR and on each subsequent page of the CMR is the run, which signifies the date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of “20152651700” was the date and time that the entire certified mail record was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the statutory notices to ensure that there is sufficient lead time for the notices to be manually reviewed and processed by the Division’s mail room. The run date signifies it was printed on the 265th day of 2015, or September 22, 2015. Given the relationship of the run date to the handwritten date, and taking into account the postmark on each page of the CMR, it is concluded that the handwritten date of “9/29” was intended to refer to September 29, 2015.

so when returned to the Division, 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.

6. 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."

7. The CMR in the present matter consists of 473 cut sheet pages and lists 5,194 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 473, which contains 2 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.

8. Each notice is placed in an envelope by Division personnel and delivered into the possession of a USPS representative, who then affixes his or her initials or signature and/or a U.S. postmark to a page or pages of the CMR. In this case, a USPS representative affixed a USPS postmark to each page of the CMR dated September 29, 2015, wrote his or her initials on page 473, and wrote the number "5194" on page 473 next to the heading "Total Pieces Received at Post Office."

9. Page 292 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0589 8677 and assessment number L-043736691, was mailed to

petitioner at the East Elmhurst, New York, address listed on the subject notice. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Melissa Kate Koslow describes the Division's mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A staff member receives 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 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 affixed a postmark dated September 29, 2015, on each page of the CMR, and initialed the last page of the CMR. The mailroom 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 writing the number "5194" on the last page next to the heading "Total Pieces Received at Post Office."

11. Based upon her review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the CMR, and her personal knowledge of the procedures of the mail room, Ms. Koslow stated that on September 29, 2015, an employee of the mail room delivered one piece of certified mail addressed to petitioner, "SARMIENTO-ANGEL, 3244 99TH ST. APT 1, EAST

ELMHURST, NY 11369-1821,” to a branch of the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail. Ms. Koslow attested that the procedures described in her affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on September 29, 2015.

12. As noted, Heidi Corina is a Legal Assistant 2 in the Division’s Office of Counsel. As part of her duties, Ms. Corina prepares USPS form 3811-A, or makes a request of the Division’s mail room staff that the form be prepared. Form 3811-A is used by the mailer to request return receipts after mailing. A form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The USPS will provide whatever information it has concerning delivery when delivery can be confirmed.

13. Attached to Ms. Corina’s affidavit is a copy of the form 3811-A that was requested for petitioner regarding the notice mailed on September 29, 2015. This form requests information regarding a piece of mail bearing article number 7104 1002 9730 0589 8677² and addressed to petitioner at 3244 99th St., Apt. 1, East Elmhurst, NY 11369-1831. Also attached to Ms. Corina’s affidavit is the USPS’s response to the Form 3811-A request, a letter on USPS letterhead dated March 27, 2017. The letter refers to the certified mail number item and states in part: “The delivery record shows that this item was delivered on October 1, 2015 at 3:04 pm in EAST ELMHURST, NY 11369.” The letter contains a scanned image of the signature of the recipient,

² This is the same number as the certified number on the CMR corresponding with the mailing of the notice of determination to petitioner on September 29, 2015.

which is not legible, and a scanned image of the address of the recipient, which Ms. Corina identifies as a part of petitioner's East Elmhurst address, i.e., "3244 99."

14. According to the Division's records, petitioner's 2013 income tax return was filed on June 3, 2014, and was the last return filed by petitioner prior to the issuance of the notice in issue. The Division's records do not reflect the filing of an income tax return by petitioner for tax year 2014. Petitioner has not offered any evidence to the contrary.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first observed that, as the present matter originated with a notice of intent to dismiss petition, the standard of review is the same as that of a summary determination motion. The Administrative Law Judge noted that such a motion may be granted where no disputed material issue of fact exists.

Next, the Administrative Law Judge reviewed well established statutory and case law relevant to the timeliness of protests of notices of determination. The Administrative Law Judge found that 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. According to the Administrative Law Judge, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case in order to meet this burden.

The Administrative Law Judge concluded that the Division met these evidentiary standards and established that the subject notice of determination was properly mailed to petitioner on September 29, 2015. Specifically, the Administrative Law Judge found that the Nagengast and Koslow affidavits and the CMR establish both the Division's general mailing procedure and that such procedure was followed in the present case. The Administrative Law Judge also concluded that the Corina affidavit establishes that the notice was delivered as addressed.

The Administrative Law Judge rejected petitioner's argument that the Division failed to use petitioner's last known address in mailing the subject notice. Instead, the Administrative Law Judge found that the Division met the last known address requirement by using the address listed on petitioner's 2013 personal income tax return, which was the last return filed by petitioner as of the date of the notice.

The Administrative Law Judge thus concluded that, as the petition herein was late-filed, the Division of Tax Appeals lacks jurisdiction in this matter. Accordingly, the Administrative Law Judge dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue that the Division failed to mail the subject notice to his last known address as required and that, accordingly, his petition should be deemed timely and a hearing on the merits granted. Specifically, petitioner contends that the Division knew or should have known that his address at the time that the notice of determination was issued was the Maspath, New York address listed on the warrant. In support of this contention, petitioner submitted documents with his exception that were not part of the record before the Administrative Law Judge. Such documents include a copy of a 2013 form W-2 issued to petitioner as an employee of Sabor Y Rumba, Inc., an unsigned copy of Sabor Y Rumba, Inc.'s 2012 New York S corporation franchise tax return, a copy of petitioner's New York State driver's license, and an affidavit of petitioner, dated October 10, 2017.

It is the Division's position that the Administrative Law Judge correctly determined that the Division demonstrated proper mailing of the relevant statutory notice to petitioner's last known address. The Division asserts that its use of petitioner's address as indicated on his 2013 personal income tax return satisfies the last known address requirement. The Division opposes the receipt of the evidentiary documents offered by petitioner on exception.

OPINION

The Administrative Law Judge's dismissal of petitioner's protest of the notice of determination at issue was made following the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). That is, such a motion "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]).

"The proponent of a summary judgment [or determination] motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In contrast, the opponent of such a motion "must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With exceptions not relevant here, there is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138 [a] [1]). There is a similar 90-day time limit to file a request for conciliation conference with the Bureau of Conciliation and Mediation Services if the taxpayer so chooses (Tax Law § 170 [3-a] [a]). A notice of determination is binding upon a taxpayer unless he or she files a timely petition or a timely request for conciliation conference (Tax Law § 1138 [a] [1]). The Division of Tax Appeals and

this Tribunal lack jurisdiction to consider the merits of a late-filed protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]).

Where, as here, the timeliness of a taxpayer's petition 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). 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 this burden by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

We agree with the Administrative Law Judge's conclusion that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Ms. Koslow, Division employees involved in and possessing knowledge of the process.

We also agree with the Administrative Law Judge's conclusion that the CMR relevant to this matter was properly completed. As noted, petitioner's name and address, and corresponding certified control and assessment numbers are included thereon. Additionally, the CMR bears USPS postmarks dated September 29, 2015 on each page thereof. A USPS employee hand wrote the total number of pieces received and initialed the last page of the CMR to indicate receipt by the post office of all pieces of mail listed thereon in accordance with the Division's standard mailing procedure. As so completed, the CMR is highly probative evidence of the fact and date of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

We thus agree with the Administrative Law Judge's conclusion that the Division has met its burden to show that the notice of determination at issue was mailed as addressed to petitioner on the date claimed.

Regarding the question of petitioner's last known address, Tax Law § 1138 (a) (1) requires that a notice of determination "shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state." Tax Law § 1147 (a) (1) effectively defines "last known address" by providing that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended "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). In the absence of any such article 28 return or application, we have held that the mailing of a notice of determination to an individual at the address given in the last New York personal income tax return filed under article 22 by that individual at the time of such mailing fulfills the Division's "last known address" obligation pursuant to Tax Law §§ 1138 (a) (1) and 1147 (a) (1) (*see Matter of Manthas*, Tax Appeals Tribunal, June 1, 2017; *Matter Garitta*, Tax Appeals Tribunal, February 21, 2017; *Matter of Toomer*, Tax Appeals Tribunal, August 14, 2003).

Here, the notice of determination was mailed to petitioner by certified mail on September 29, 2015 at the East Elmhurst address set forth on his 2013 resident income tax return, which had been filed on June 3, 2014. The Division avers that, according to its records, this was the address reported by petitioner on the last New York income tax return filed by him prior to the issuance of the notice (*see* finding of fact 14). Petitioner has not contested the accuracy of this assertion.³

³ Indeed, at oral argument petitioner conceded that he did not file a 2014 return.

Furthermore, the record contains no evidence indicating that petitioner gave the Division “clear and concise notification” of a change of address prior to the mailing of the notice of determination (*Matter of Manthas* citing *Alta Sierra Vista, Inc. v Commissioner of Internal Revenue*, 62 TC 367, 374 [1974], *affd* 538 F2d 334 [9th Cir. 1976]). The Division has thus made a prima facie showing that the notice of determination was properly addressed to petitioner in accordance with Tax Law §§ 1138 (a) (1) and 1147 (a) (1).

Petitioner contends that the warrant, docketed on April 12, 2016 and bearing the Maspeth, New York address raises the material issue of whether the Division knew or should have known that petitioner no longer resided at the East Elmhurst address at the time the notice was issued. We disagree. As the Administrative Law Judge noted, the warrant was docketed more than six months after the September 29, 2015 mailing of the notice of determination and is thus of little probative value regarding petitioner’s last known address as of the date of such mailing.

Tax Law § 1147 (a) (1) also provides that the proper mailing of a notice of determination “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” Receipt is thus “a part of the procedural equation [in sales tax cases] and by characterizing mailing as only ‘presumptive evidence’ establishes the taxpayer’s right to rebut the presumption” (*Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin. of State of N.Y.*, 64 NY2d 688, 690 [1984]).

As discussed, the Division has submitted sufficient proof to show that the subject notice of determination was properly mailed to petitioner pursuant to Tax Law § 1138 (a) (1) on September 29, 2015. The Division also showed that the notice was delivered to the East Elmhurst address on October 1, 2015 (*see* finding of fact 13). Petitioner’s denial of receipt is legally insufficient to rebut the presumption of receipt (*Matter of T. J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986] [a successful rebuttal “must consist of more

than a mere denial of receipt”). As to the warrant, given the six-month span between the date of the notice and the date of the warrant, this document’s lack of probative value also extends to the question of receipt.

As noted, petitioner also submitted documents with his exception that were not part of the record before the Administrative Law Judge. Our position on the submission of evidence on exception may be summarized as follows:

“We have held that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]’ (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, **confirmed** 116 AD3d 1176 [3d Dept 2014]). Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991)” (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014; *see also Matter of Spiezio v Commissioner of Taxation and Fin. of State of N.Y.*, 165 AD3d 1502 [3d Dept 2018] [The Tribunal properly declined to consider evidence submitted for the first time on exception]).

We thus do not accept into the record the documents submitted by petitioner on exception and have not considered such documents in the rendering of this decision.

Pursuant to the foregoing discussion, we find that the Division properly issued the subject notice of determination to petitioner at his last known address on September 29, 2015. Petitioner’s petition in protest of the notice, filed on February 1, 2017, was thus untimely (Tax Law § 1138 [a] [1]). As noted previously, the Division of Tax Appeals lacks jurisdiction to consider the merits of an untimely protest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Angel Sarmiento is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Angel Sarmiento is dismissed.

DATED: Albany, New York
December 20, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner